

Journal of Interpersonal Violence



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Federal Register

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Tuesday, December 22, 1992

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 430, 432, and 540

RIN 3206-AE76

Performance Management and Recognition System

AGENCY: Office of Personnel
Management.

ACTION: Final rulemaking.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations on the Performance Management and Recognition System (PMRS) reflecting changes authorized by the "Performance Management and Recognition System Amendments of 1991," Public Law 102-22, dated March 28, 1991, which extends the PMRS to September 30, 1993. This Act also made two changes that authorized agencies to use work objectives in addition to, or in lieu of, critical elements and standards and deleted the required 2 percent of basic pay performance award for PMRS employees rated at level 5. In issuing this regulation, OPM emphasizes that agency adoption of these two changes is optional. However, if agencies choose to implement either or both of these changes, their revised performance management plans must be submitted to OPM for approval.

EFFECTIVE DATE: April 1, 1991.

FOR FURTHER INFORMATION CONTACT:

Rachel Steed (202) 606-2720, concerning questions about the changes in 5 CFR parts 430 and 540; and Sharon C. Snellings (202) 606-1259, concerning questions about the changes in 5 CFR part 432.

SUPPLEMENTARY INFORMATION: On June 1, 1992, at 57 FR 23043, OPM published interim regulations with a 30-day comment period that (1) extended the PMRS to September 30, 1993; (2) allowed agencies to use statements of

work objectives for an employee's position to evaluate job performance instead of, or in addition to, critical elements and standards; and (3) deleted the mandatory performance award for employees rated at level 5. Consistent with the deletion of the required 2 percent performance award for a level 5 performance rating and in an effort to provide agencies with greater flexibility, the interim regulations deleted the requirement that stipulates higher awards for higher performance ratings with respect to employees in the same grade and pool.

During the comment period, which ended July 1, 1992, OPM received nine comments: Four from Federal agencies and five from a group of individual employees from one Federal agency. Two Federal agencies asked for clarification regarding several aspects of work objectives. One agency expressed concern over removing the requirement that higher rated employees in the same grade receive higher awards, while two other agencies expressed their support for the elimination of this requirement. The individuals responding expressed concern about the performance management system at their agency and, for the most part, did not address the changes published in the interim regulations.

An editorial change is being made at § 540.109 (b)(1)(i) to correct an erroneously designated paragraph published in the interim regulations.

Following are the identification of the major issues raised, a summary of comments, and a discussion of OPM rationale for any changes being made.

1. The use of work objectives in addition to, or in lieu of, critical elements and standards.

Summary of Comments: Two agencies asked about the definition of all work objectives as being critical in the same way as critical elements. One agency expressed concern over the additional regulatory language that requires agencies to describe work objectives in two parts: Performance requirements and performance objectives. One agency also suggested that additional references to work objectives be included in several sections of Part 540 for consistency.

Discussion: The questions regarding whether all work objectives must be critical in the same way that critical elements are caused OPM to re-examine

this issue. This question stems from the legislative language which states that an agency performance appraisal system may utilize a written statement of the work objectives of the employee's position to establish performance requirements related to the position and to evaluate job performance against such requirements. Such statement of work objectives may be used in lieu of, or in addition to, critical elements and performance standards, thus implying that agencies may not establish non-critical work objectives. However, this language does not preclude an agency from establishing non-critical work objectives. Just as they may establish non-critical elements and performance standards, even though non-critical elements and performance standards are not specifically provided for in law, so may they establish non-critical work objectives. The interim regulations do not make clear that agencies may establish both critical and non-critical work objectives. Therefore, we are providing in the final regulations that agencies may do so.

One agency noted that although the interim regulations state how work objectives are the same as critical elements and standards, they do not state how they differ. By allowing agencies to use work objectives in addition to, or in lieu of, critical elements and standards to describe work, Congress clearly intended agencies to have increased flexibility in the methods used to describe work. Therefore, OPM believes it inappropriate to restrict this flexibility by adding additional regulatory language. The same agency also noted that Congress may have intended to simplify the process of developing performance standards by allowing agencies to use work objectives describing the Fully Successful level without necessarily describing the performance requirements at other levels. For clarification, agencies currently have the flexibility to describe performance only at the Fully Successful level for all critical and non-critical elements (5 CFR 430.405(e)).

In response to one agency's suggestion that additional references to work objectives be included in part 540, we have adopted this suggestion and have added the appropriate references.

One agency objected to being bound by regulatory language in the interim

regulations that require work objectives to be composed of two identifiable parts—*performance requirements and performance objectives*. However, OPM believes that the regulatory language tracks the legislative language which states work objectives must establish what the major duties are (performance requirements) as well as the expectations management will establish to evaluate job performance of those duties (performance objectives). Consequently, OPM believes that these regulations should clearly provide that work objectives are composed of two identifiable parts—what the performance requirements (duties and responsibilities) of an employee's job are and what the performance objectives (expectations) are that will be used to evaluate performance.

Change: Sections 430.404, 430.405, 430.406, 430.407, 432.103, 432.105, 432.107, and 540.102 have been revised to include references to both critical and non-critical work objectives. Sections 540.108 (a)(1) and (a)(1)(i), which were not included in the interim regulations, have been revised to include additional references to work objectives.

2. Deletion of the requirement that stipulates higher awards for higher performance ratings with respect to employees in the same grade and pool.

Summary of Comments: One agency expressed concern with removing the requirement that agencies must pay higher awards for higher performance ratings to employees in the same grade and pool. They felt that the requirement should be left in place to ensure that the system continues to reward higher ratings with larger awards in keeping with the philosophy of pay-for-performance. Another agency commented that they support the elimination of the requirement that higher awards be paid for higher performance ratings because they believe this change will provide more flexibility to adjust awards based on management needs. Several individual commentors also felt that employees with higher performance ratings should receive higher awards.

Discussion: OPM supports the policy that higher performance should normally receive higher awards and expects agencies to follow this course in most cases. As stated in the supplementary information accompanying the interim regulations, "we expect that agencies will, in most cases, continue to give higher awards to employees in the same grade level receiving higher performance ratings." Many agencies have indicated they will continue the policy of awarding higher performance with

higher awards but, at the same time, have commended the additional flexibility this change provides. In addition, this policy is consistent with the performance award policy for non-PMRS employees, whereby any employee rated Fully Successful and above is eligible for a performance award, with no requirement that higher ratings require larger awards.

Change: No change.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations will only affect Government employees and agencies.

List of Subjects

5 CFR Part 430

Decorations, medals, awards; Government employees.

5 CFR Part 432

Administrative practice and procedure; Government employees.

5 CFR Part 540

Government employees; Wages.

U.S. Office of Personnel Management.

Douglas A. Brook,
Acting Director.

Accordingly, the interim rule amending 5 CFR parts 430, 432, and 540 published on June 1, 1992, at 57 FR 23043 is adopted as final with the following changes:

PART 430—PERFORMANCE MANAGEMENT

1. The authority citation for part 430 continues to read as follows:

Authority: 5 U.S.C. chapter 43, 45, 53, and 54.

2. In § 430.404, the definitions of appraisal, appraisal system, performance, performance plan, and summary rating are revised, the definition of work objective is removed, and the new definitions of critical work objective and non-critical work objectives are added to read as follows:

§ 430.404 Definitions.

Appraisal means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s) and/or performance objective(s).

Appraisal system means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5, U.S.C., and this subpart which provides for identification of critical and non-critical elements, and/or critical and non-critical work objectives; establishment of performance standards; communication of elements, standards, and/or work objectives to employees; establishment of methods and procedures to appraise performance against established standards and/or performance objectives; and appropriate use of appraisal information in making personnel decisions.

Critical work objective means a component of a position consisting of one or more performance requirements of such importance that unacceptable performance on the work objective would result in unacceptable performance in the position. Work objectives are written statements that contain one or more performance requirements of a PMRS employee's position and one or more performance objectives used to evaluate job performance against such requirements.

Non-critical work objective means a component of an employee's position that does not meet the definition of a critical work objective, but is of sufficient importance to warrant written appraisal. Non-critical work objectives are written statements that contain one or more performance requirements of a PMRS employee's position and one or more performance objectives used to evaluate job performance against such requirements. Non-critical work objectives are optional and may be used at agency discretion.

Performance means an employee's accomplishment of assigned work as specified in the critical and non-critical elements and/or critical and non-critical work objectives of the employee's position.

Performance plan means the aggregation of all of an employee's written critical elements, non-critical elements, performance standards, and/or critical and non-critical work objectives.

Summary rating means the written record of the appraisal of each critical and non-critical element, and/or critical and non-critical work objective and the assignment of a summary rating level (as specified in § 430.405(h) of this subpart).

3. In § 430.405, paragraphs (b), (e), (g), (i) introductory text, (i)(1), and (j)(1) are revised to read as follows:

§ 430.405 Agency performance appraisal systems.

(b) Under each appraisal system, critical elements and/or critical work objectives must be included, and non-critical elements and/or non-critical work objectives may be included in individual performance plans. An employee must be appraised on each critical element, non-critical element, critical work objective, and non-critical work objective in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element/work objective. A summary rating level, as specified in § 430.405(h), must be assigned.

(e) Each appraisal system shall provide for a minimum of three rating levels for each critical element or critical work objective. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements and may be written at other levels. Performance objectives must be written at the "Fully Successful" level for each performance requirement of each critical and non-critical work objective and may be written at other levels. The absence of a written standard or performance objective at a given rating level should not preclude the assignment of a rating at that level.

(g) Each appraisal system shall include a method for deriving a summary rating level from performance appraisals of critical elements and/or critical work objectives and, at agency discretion, appraisals of non-critical elements and/or non-critical work objectives. If appraisals of non-critical elements and/or non-critical work objectives are considered in deriving summary rating levels, the derivation method must show that more weight will be given to critical elements and critical work objectives than to critical elements and non-critical work objectives.

(i) Each appraisal system shall provide for a performance improvement plan (PIP) for each employee whose performance has been determined to be below fully successful on one or more critical elements or critical work objectives. The PIP must:

(1) Notify the employee of the critical element(s) and/or critical work

objective(s) in which he or she is performing below the fully successful level;

(j) * * *

(l) Each appraisal system shall provide for reassigning, reducing in grade, or removing any employee who fails to attain at least the fully successful level, but only after affording the employee a reasonable period to improve performance to at least the fully successful level on the critical element(s) and/or critical work objective(s) determined to be below fully successful, as required in 5 U.S.C. 4302a(b)(6).

4. Section 430.406 is amended by revising paragraphs (c) and (d) (1) to read as follows:

§ 430.406 Appraisal of performance.

(c) *Appraisal of each element/work objective.* An employee must be appraised on each critical element, non-critical element, critical work objective, and non-critical work objective in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element or work objective.

(d) * * *

(1) When employees are detailed or temporarily promoted within the same agency, and the detail or temporary promotion is expected to last 120 days or longer, agencies shall provide written critical elements and performance standards and/or critical work objectives to the employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion. Ratings on critical elements and/or critical work objectives must be prepared for these details and temporary promotions and must be considered in deriving an employee's next rating of record.

5. Section 430.407 is amended by revising paragraph (b) to read as follows:

§ 430.407 Ratings.

(b) *Appraisal of each critical element, non-critical element, critical work objective, and non-critical work objective.* Employees must be appraised on each critical element, non-critical element, critical work objective, and non-critical work objective of the performance plan(s) on which the employee has had a chance to perform.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

6. The authority citation for part 432 continues to read as follows:

Authority: 5 U.S.C. 4302a, 4303, and 4305

7. Section 432.103 is amended as follows:

- a. Paragraph (j) is removed;
- b. Paragraphs (c) through (i) are redesignated (d) through (j) respectively;
- c. Paragraphs (a), newly redesignated (e), (f), and (j), are revised; and
- d. A new paragraph (c) is added.

§ 432.103 Definitions.

(a) *Acceptable performance* means performance that meets an employee's performance requirement(s) or standard(s) at a level of performance above "unacceptable" in the critical element(s) at issue where the employee is not covered by the Performance Management and Recognition System (PMRS). For those employees covered by the PMRS, acceptable performance is performance determined to be at the fully successful level or above in the critical element(s) and/or critical work objective(s) at issue.

(c) *Critical work objective* means a component of a position consisting of one or more performance requirements of such importance that unacceptable performance on the work objective would result in unacceptable performance in the position. Work objectives are written statements that contain one or more performance requirements of a PMRS employee's position and one or more performance objectives used to evaluate job performance against such requirements.

(e) *Opportunity to demonstrate acceptable performance* means a reasonable chance for the employee whose performance has been determined to be unacceptable in one or more critical elements or in one or more critical work objectives to demonstrate acceptable performance in the critical element(s) and/or critical work objective(s) at issue.

(f) *Performance improvement plan* means the plan agencies are required to provide to a PMRS employee whose performance in one or more critical elements or in one or more critical work objectives has been determined to be below the fully successful level. As part of the plan, agencies shall notify the employee of the critical element(s) and/or critical work objective(s) in which he or she is performing below the fully

successful level; describe the types of improvements that the employee must demonstrate to attain fully successful performance; offer assistance to the employee in attaining fully successful performance; and provide the employee with a reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate fully successful performance. The agency may include, as part of the performance improvement plan, other information and matters that the agency considers appropriate.

(j) *Unacceptable performance* means performance of an employee that fails to meet established performance standards in one or more critical elements or fails to meet the performance objectives in one or more critical work objectives of such employee's position.

8. Section 432.105 is revised to read as follows:

§ 432.105 Addressing below fully successful performance by PMRS employees.

At any time during the performance appraisal cycle that a PMRS employee's performance is determined to be below fully successful in one or more critical elements or in one or more critical work objectives, the agency shall afford the employee an opportunity to improve through a performance improvement plan. As part of the plan, the agency shall notify the employee of the critical element(s) and/or critical work objective(s) in which he or she is performing below the fully successful level; describe the types of improvements that the employee must demonstrate to attain fully successful performance; offer assistance to the employee in attaining fully successful performance; and provide the employee with a reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate fully successful performance. The agency may include, as part of the performance improvement plan, other information and matters that the agency considers appropriate. The agency should also inform the employee that, unless his or her performance in the critical element(s) and/or critical work objective(s) improves to and is sustained at a fully successful level, the employee may be reduced in grade or removed.

9. In § 432.107, paragraphs (a)(1), (a)(2), and (a)(4)(i)(A), are revised to read as follows:

§ 432.107 Proposing and taking action based on performance below the fully successful level for PMRS employees.

(a) * * *

(1) Once an employee has been afforded an opportunity to improve performance to the fully successful level through a performance improvement plan pursuant to § 432.105, an agency may propose a reduction in grade or removal action if the employee's performance during or following the performance improvement plan is below fully successful in one or more critical elements or one or more critical work objectives for which the employee was afforded an opportunity to improve through a performance improvement plan.

(2) If an employee has performed at the fully successful level for 1 year from the beginning of a performance improvement plan in the critical element(s) and/or critical work objective(s) for which the employee was afforded a performance improvement plan and the employee's performance again is determined to be below fully successful, the agency shall afford the employee an additional performance improvement plan before determining whether to propose a reduction in grade or removal under this part.

(4) * * *

(i) *Advance notice.* (A) The agency shall afford the employee a 30-day advance notice of the proposed action that identifies both the specific instances of below fully successful performance by the employee on which the proposed action is based and the critical element(s) and/or critical work objective(s) of the employee's position involved in each instance of below fully successful performance.

PART 540—PERFORMANCE MANAGEMENT AND RECOGNITION SYSTEM

10. The authority citation for part 540 continues to read as follows:

Authority: 5 U.S.C. chapters 43 and 54.

11. In § 540.102, the definitions of rating and summary rating, are revised:

§ 540.102 Definitions.

* * * * *

Rating (See *Summary rating*).

* * * * *

Summary rating means the written record of the appraisal of each critical and non-critical element, and/or critical and non-critical work objective and the assignment of a summary rating level (as

specified in § 430.405(h) of this chapter).

12. In § 540.108, paragraphs (a)(1) and (a)(1)(i) are revised to read as follows:

§ 540.108 Special provisions for pay administration.

(a)(1) This paragraph applies when an employee cannot be rated for the current appraisal period under elements and standards and/or work objectives established under 5 U.S.C. 4302a, under the following circumstances:

(i) An employee who is not under elements and standards and/or work objectives, established under 5 U.S.C. 4302a, for the agency's minimum appraisal period, except as provided in § 540.107 (d) and (e) of this part; or

* * * * *

13. Section 540.109 is amended by removing the two current paragraphs designated as (b)(1)(i) and adding a new paragraph (b)(1)(i) to read as follows:

§ 540.109 Performance awards.

* * * * *

(b)(1) * * *

(i) In accordance with 5 U.S.C. chapter 54, each agency is required to pay a minimum of 1.15 percent of the estimated aggregate amount of PMRS employees' basic pay for each fiscal year during which this section is in effect for performance awards.

* * * * *

[FR Doc. 92-30908 Filed 12-21-92; 8:45 am] BILLING CODE 6325-01-M

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R-0776]

Capital; Capital Adequacy Guidelines

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is modifying its risk-based capital guidelines for state member banks and bank holding companies to include the European Bank for Reconstruction and Development (EBRD), the International Finance Corporation (IFC), and the Nordic Investment Bank (NIB) in the list of named multilateral lending institutions that are eligible for a 20 percent risk weight. This modification would conform the Board's risk-based capital guidelines more closely to interpretive guidance adopted by the other G-10 countries that are signatories to the Basle Accord.

EFFECTIVE DATE: The final rule is effective as of December 22, 1992.

FOR FURTHER INFORMATION CONTACT:

Norah Barger, Manager, Policy Development (202/452-2402), Ali Emran, Financial Analyst (202/452-2208), Division of Banking Supervision and Regulation; and Brian E. J. Lam, Attorney (202/452-2067), Legal Division, Board of Governors of the Federal Reserve System. For the hearing impaired *only*, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452-3544) Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Under the risk-based capital framework established by the Basle Accord, claims on, and claims guaranteed by, multilateral lending institutions and regional development banks in which G-10 countries are shareholding members may be accorded, at national discretion, a 20 percent risk weight. Like the Basle Accord, the Board's risk-based capital guidelines specify five multilateral lending institutions and regional development banks¹ that are eligible for the 20 percent risk weight. The guidelines further state that other multilateral lending institutions and regional development banks may be accorded a 20 percent risk weight if the U.S. government is a shareholder or contributing member.

On September 16, 1992, the Board proposed clarifying that bank holding companies and state member banks may assign a 20 percent risk weight to claims on, or guaranteed by, the EBRD, the IFC, or the NIB. The U.S. is a contributing shareholder of the EBRD, but this organization was established after the original publication of the capital adequacy guidelines. Since the IFC is a subsidiary of the World Bank, an organization that the guidelines specifically names as an institution eligible for the 20 percent risk weight, it implicitly is included in the 20 percent risk category. Although the U.S. is neither a shareholder nor a contributing member of the NIB, the Basle Committee on Banking Supervision has interpreted the criteria in the Basle Accord for assigning a multilateral lending institution to the 20 percent risk category to mean that any country may include the NIB in this preferential risk category since Sweden, a G-10 country, is a shareholder in the NIB. Thus, adding the NIB to the list of named multilateral lending institutions

¹ International Bank for Reconstruction and Development (World Bank), Interamerican Development Bank, Asian Development Bank, African Development Bank, and the European Investment Bank.

eligible for a 20 percent risk weight would serve to conform the Board's risk-based capital guidelines more closely to the interpretative guidance adopted by the other G-10 countries that are signatories to the Basle Accord.

The proposed modifications to the risk-based capital guidelines would have the effect of also including in the 20 percent risk category portions of claims collateralized by securities issued by the EBRD, IFC, and NIB.

The Board's proposal on multilateral lending institutions took the form of an interim rule that was effective immediately. The comment period ended October 23, 1992. The Board received no public comments and, thus, is now issuing in final form an amendment to the risk-based capital guidelines to include in the 20 percent category claims on and claims guaranteed by the EBRD, IFC, and NIB as well as portions of claims collateralized by securities issued by those multilateral lending institutions.

Regulatory Flexibility Act Analysis

The Federal Reserve Board does not believe adoption of this proposal would have a significant economic impact on a substantial number of small business entities (in this case, small banking organizations), in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In this regard, the proposed revision would reduce certain regulatory burdens on bank holding companies as it would reduce the capital charge on certain transactions. In addition, because the risk-based capital guidelines generally do not apply to bank holding companies with consolidated assets of less than \$150 million, this proposal will not affect such companies.

List of Subjects

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Currency, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, and pursuant to the Board's authority under section 5(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844 (b)), and section 910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3909), the Board is

amending 12 CFR parts 208 and 225 as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM

1. The authority citation for part 208 is revised to read as follows:

Authority: Sections 9, 11(a), 11(c), 19, 21, 25, and 25(a) of the Federal Reserve Act, as amended (12 U.S.C. 321-338, 248(a), 248(c), 461, 481-486, 601 and 611, respectively); sections 4, 13(j), and 18(o) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1814, 1823(j), and 1828(o), respectively); section 7(a) of the International Banking Act of 1978 (12 U.S.C. 3105); sections 907-910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3906-3909); sections 2, 12(b), 12(g), 12(i), 15B(c) (5), 17, 17A, and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78b, 78l(b), 78l(g), 78l(i), 78o-4(c) (5), 78q, 78q-1, and 78w, respectively); section 5155 of the Revised Statutes (12 U.S.C. 36) as amended by the McFadden Act of 1927; and sections 1101-1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3310 and 3331-3351).

2. Appendix A to part 208 is amended by revising the second sentence of the second paragraph in III.C.2 to read as follows:

Appendix A to Part 208—Capital Adequacy Guidelines For State Member Banks: Risk-Based Measure

* * * * *
 III. * * *
 C. * * *

2. * * * In addition, this category also includes claims on, and the portions of claims that are guaranteed by, U.S. government-sponsored³² agencies and claims on, and the portions of claims guaranteed by, the International Bank for Reconstruction and Development (World Bank), the International Finance Corporation, the Interamerican Development Bank, the Asian Development Bank, the African Development Bank, the European Investment Bank, the European Bank for Reconstruction and Development, the Nordic Investment Bank, and other multilateral lending institutions or regional development banks in which the U.S. government is a shareholder or contributing member. * * *

³² For this purpose, U.S. government-sponsored agencies are defined as agencies originally established or chartered by the Federal government to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. government. These agencies include the Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA), the Farm Credit System, the Federal Home Loan Bank System, and the Student Loan Marketing Association (SLMA). Claims on U.S. government-sponsored agencies include capital stock in a Federal Home Loan Bank that is held as a condition of membership in that Bank.

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL

1. The authority citation for part 225 is revised to read as follows:

Authority: 12 U.S.C. 1817(j) (13), 1818(b), 1828(o), 1831i, 1843(c) (8), 1844(b), 1972(l), 3106, 3108, 3907, 3909, 3310, 3331-3351, and sec. 306 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, 105 Stat. 2236 (1991)).

2. Appendix A to part 225 is amended by revising the second sentence of the second paragraph in III.C.2 to read as follows:

Appendix A to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

III. * * *
C. * * *

2. * * * In addition, this category also includes claims on, and the portions of claims that are guaranteed by, U.S. government-sponsored²⁵ agencies and claims on, and the portions of claims guaranteed by, the International Bank for Reconstruction and Development (World Bank), the International Finance Corporation, the Interamerican Development Bank, the Asian Development Bank, the African Development Bank, the European Investment Bank, the European Bank for Reconstruction and Development, the Nordic Investment Bank, and other multilateral lending institutions or regional development banks in which the U.S. government is a shareholder or contributing member. * * *

Board of Governors of the Federal Reserve System, December 16, 1992.

William W. Wiles,
Secretary of the Board.

[FR Doc. 92-30962 Filed 12-21-92; 8:45 am]

BILLING CODE 6210-01-F

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 702

Reserves

AGENCY: National Credit Union Administration (NCUA).

²⁵ For this purpose, U.S. government-sponsored agencies are defined as agencies originally established or chartered by the Federal government to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. government. These agencies include the Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA), the Farm Credit System, the Federal Home Loan Bank System, and the Student Loan Marketing Association (SLMA). Claims on U.S. government-sponsored agencies include capital stock in a Federal Home Loan Bank that is held as a condition of membership in that Bank.

ACTION: Final rule.

SUMMARY: The NCUA is amending its regulations to modify the valuation of the allowance for loan losses to better conform with generally accepted accounting principles (GAAP). This change will require credit unions to provide an allowance for loan losses sufficient to cover specifically identified loans, as well as estimated losses inherent in the loan portfolio, such as loans and pools of loans for which losses are probable, but not identifiable on a specific loan-by-loan basis.

EFFECTIVE DATE: January 21, 1993.

ADDRESSES: National Credit Union Administration, 1776 G Street, NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Karen Kelbly, Accounting Officer, Office of Examination and Insurance (202) 682-9640, or Michael McKenna, Staff Attorney, Office of General Counsel (202) 682-9630, at the above address.

SUPPLEMENTARY INFORMATION:

Discussion

Section 116 of the FCU Act (12 U.S.C. 1762) sets forth reserve requirements for federal credit unions. Section 702.3 of the NCUA Rules and Regulations addresses full and fair disclosure concerning reserves. Section 741.9(a)(1) of the Rules and Regulations requires that federally insured state-chartered credit unions comply with statutory reserves (Section 116 of the Federal Credit Union Act) and with full and fair disclosure requirements of the Rules and Regulations (§ 702.3). Therefore this final amendment applies to all federally insured credit unions.

Section 116(a) of the Federal Credit Union Act requires that federal credit unions set aside a certain percentage of gross income at the end of each accounting period as a Regular Reserve. According to § 702.2(a) of the Rules and Regulations, the totals of the Regular Reserve, the Allowance for Loan Losses account and the Allowance for Investment Losses are combined for determining the applicable percentage of gross income to be transferred to the Regular Reserve.

Historically, credit unions have established a valuation for the allowance for loan losses based strictly on nonperforming or delinquent loans. This practice, however, is inconsistent with generally accepted accounting principles (GAAP). The NCUA Board believes that greater emphasis needed to be placed upon complying with GAAP through estimating probable losses inherent in the total loan portfolio when calculating a valuation of the allowance

for loan losses. This modified valuation would present a more accurate reflection of the expected loan losses.

In light of this concern, in September 1991, NCUA issued *Letter to Credit Unions No. 126*, and in July 1992, issued *Accounting Bulletin No. 92-1*, to provide interim guidance on how examiners would test the adequacy of a credit union's allowance for loan losses. On June 23, 1992, the NCUA Board issued a proposed amendment (57 F.R. 29050, 6/30/92) to § 702.3(c)(2) to require credit unions to provide an allowance for loan losses sufficient to cover specifically identified loans, as well as estimated losses inherent in the loan portfolio, such as loans and pools of loans for which losses are probable, but not identifiable on a specific loan-by-loan basis.

Presently, § 702.3(c)(2) reads in part that the:

Valuation allowance established fairly presents the value of loans and anticipated losses resulting from (i) uncollectable loans and notes and contracts receivable including, where applicable, any uncollectable accrued interest receivable thereon, (ii) assets acquired in liquidation of loans, and (iii) loans purchased from other credit unions.

NCUA proposed three changes to the above-cited provisions. First, the phrase "the value of loans and anticipated losses" was proposed to read "the value of loans and probable losses" since the term "probable" is the term used and understood under GAAP. Second, the three sub-points setting forth what the allowance must encompass are changed to read simply, "the value of loans and probable losses for all categories of loans." The change shifts the emphasis from nonperforming or classified loans only to categories of loans within the total portfolio, classified or unclassified. The third change provides additional guidance as to the necessary components of the allowance to meet the "all categories of loans" standard, i.e., estimates of probable losses consistent with guidance adopted from the American Institute of Certified Public Accountants (AICPA) *Exposure Draft to the Audit and Accounting Guide, Audits of Credit Unions.*"

Comments

Sixty-one comment letters were received. Thirty-six comments were received from federal credit unions, thirteen comments from state-chartered credit unions, seven comments from state credit union leagues, and two comments from national credit union trade associations. Comments were also received from a state regulatory agency, an accounting firm, and a national accounting trade association.

In general, the commenters disapproved of the proposed amendment. Although many commenters stated that they objected to the amendment, the substance of their remarks indicated that they were really objecting to the examination testing methodology set forth in Letter to Credit Unions No. 126, and more recently, Accounting Bulletin No. 92-1. Eight commenters approved of the amendment as proposed although two of these commenters did have concerns about the examination testing portion of Accounting Bulletin 92-1 which would implement the proposed amendment. Fifty-three commenters objected to the amendment in part or in its entirety.

Sixteen commenters believe the amendment is overly conservative because it provides for the double counting of anticipated losses on delinquent and nonperforming loans. The Board disagrees. The amendment, which adopts GAAP language, does not provide for double counting. It simply requires estimating probable losses in the total loan portfolio. In a similar vein, nine commenters object to the amendment because they believe it will grossly overstate the allowance for loan losses (ALL) account. The Board believes, as does the accounting standards-setters who also commented on the amendment, if properly applied, the amendment should not overstate the allowance.

Nine commenters believe the amendment will have a detrimental effect on small credit unions. Some of these commenters believe small credit unions will have to spend a substantial amount of time setting up the listed loan classifications, as well as modifying their loan review timelines to conform to the amendment. Again, the Board disagrees. The amendment allows great latitude to large and small credit unions alike to develop their own methodology for estimating probable losses in the total loan portfolio.

Another commenter believes that credit unions most likely to require significant increases in the ALL account may not have significant bad loans in relation to their total portfolio. The Board takes exception to this argument. If a credit union does not have significant bad loans in relation to their total portfolio, the assessment of probable loss will reflect this and, correspondingly, the ALL will also.

Two commenters believe the amendment would result in a decrease in dividends. The Board recognizes the amendment may affect a credit union's ability to pay dividends, but only to the extent that a credit union does not have current or accumulated earnings to

cover declared dividends. Again, GAAP requires the periodic recognition of estimated "bad debts" expense relative to loans and this does effect net income. Still, NCUA believes GAAP reporting must be the priority.

Three commenters believe the amendment takes authority away from credit union management and the board of directors. Again, the Board believes the amendment, as written, allows a great deal of latitude to large and small credit unions alike to develop their own methodology for estimating probable losses in the total loan portfolio under the umbrella of GAAP. It does not set forth a required methodology for estimating the allowance.

Nine commenters believe the amendment lacks specificity and will subject credit unions to the whims and interpretations of the examiner. This is not the Board's intent. Examiners have been instructed to first, examine the credit union's methodology for estimating the allowance, apply a test check, and only take exception if there are material differences. If a licensed independent accountant has rendered an opinion, examiners are encouraged not to take exception, except in rare circumstances. One commenter recommends that the credit union's historical trends in delinquency ratios, charge-offs and recoveries be considered when there is a difference between the credit union's valuation and that of the examiner. The Board intends that the examiner would consider these factors in their evaluation.

Transition Issues

Five commenters suggested a reasonable transition period for credit unions to bring their reserves into compliance. One of these commenters suggests credit unions make partial transfers to the ALL account until an acceptable balance is attained. Another commenter suggests that credit unions should be allowed to make a one-time accounting adjustment to their reserve account. Another commenter requests that credit unions required to increase the ALL due to the initial application of this amendment be given the option of charging the initial increase against retained earnings. One commenter recommends that credit unions be allowed to make transfers for up to 3 years after the effective date of the amendment to level out any year with unusually large charge-offs, as well as to fine-tune the valuation process. One commenter suggests that NCUA find a way to increase the ALL account without requiring a quarterly review of the total loan portfolio. Again, the Board will look to GAAP and encourage credit

unions to do the same. However, the Board has instructed examiners to be lenient in the initial periods of application, i.e., to consider the affects of this NCUA change. Examiners have been instructed to be reasonable.

Proposal in Relation to GAAP

One commenter was concerned about the "pools of loans" wording in proposed § 702.3(c)(2)(ii). The commenter believes that this wording implies that a credit union would have to perform as many calculations of pools as it has loan classifications. The commenter believes that this would not only be time consuming, but that it would be nearly impossible to develop historic loss ratios. The commenter states that if these pools and losses on the pools have not been tracked in the past, an accurate loss ratio would be difficult to determine. One commenter objects to the inclusion of commitments to lend or letters of credit as a component of the valuation estimate in proposed § 702(c)(2)(iii). This commenter believe the valuation should be based on the balance of the loan portfolio without consideration of the aggregate lines of credit that can be accessed.

One commenter believes the proposal exceeds GAAP requirements and suggests that instead credit unions should use an individual classification of delinquent loans and pools of loans for possible losses. This commenter believes that this would be adequate under GAAP. Another commenter recommends that NCUA withdraw this proposed amendment and instead require credit unions to conform to GAAP, to conduct an annual audit by a licensed independent accountant, and to obtain an opinion on the credit union's financial statements.

The language used in the regulation has been adopted from the AICPA. The Board can not agree, therefore, that the amendment exceeds GAAP requirements. The "pools of loans" language is very general and allows credit unions flexibility in determining how to pool loans, develop trending information, assess risk, estimate probable loss, etc.—in other words, develop their own methodology within the framework of GAAP. And GAAP requires the inclusion of commitments to lend and letters of credit in probable loss estimates. The Board is not prepared, at this time, to require credit unions to obtain an opinion audit because such a requirement would be overly burdensome for many credit unions.

One commenter believes if credit unions are required to adjust the

valuation account based upon end-of-period balances and prior to distribution of dividends, a major change in the data processing software and processing schedules would be required. The Board does not agree. This does not represent a change from current practice. Another commenter believes the amendment would force credit unions to delay the posting of dividends to the beginning of the next period. To avoid this result, the commenter recommends that the phrase "prior to the distribution or posting of any dividend to the accounts of members" be deleted in the final amendment. Again, the Board is not swayed—under GAAP estimated bad debts must be expensed before the determination of earnings available for the payment of dividends, thus the amendment's wording. Another commenter foresees unnecessary work and calculations in converting to the requirements of the proposal. The Board believes this is an overstatement. GAAP reporting must be the priority.

Examination Testing of the ALL

The balance of the comments received referred specifically to a related, but different topic—the examination approach used by NCUA examiners to test the adequacy of the credit union's allowance, as initially set forth in Letter to Credit Unions No. 126 and as incorporated in Accounting Bulletin 92-1. While we welcome these comments and accept that they are valuable for our consideration in possibly amending our ALL examination testing approach, the comments really do not relate to the reserve regulation itself, or to the advisability or inadvisability of adopting the regulation. We have not specifically addressed those comments here but the Board intends to ensure consideration is given to these comments in NCUA deliberations leading to the setting of/revision to, examination policies and procedures.

Additionally, the wording of the final amendment has been changed slightly to reflect recent changes in the AICPA's proposed wording in the *Exposure Draft to the Industry Audit and Accounting Guide, "Audits of Credit Unions."* The intent and meaning of the amendment remains unchanged as a result.

Paperwork Reduction Act

The amendment does not change the paperwork requirements.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small credit

unions (primarily those under \$1 million in assets).

The NCUA Board has determined that the amendment is necessary to meet existing requirements for full and fair disclosure although it could significantly impact some small credit unions.

Of the items required to be contained in the final regulatory flexibility analysis by 5 U.S.C. 604(a), the first ("a succinct statement of the need for, and the objectives of, the rule") and the second ("a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues and a statement of any changes made in the proposed rule of such comments") are found elsewhere in the supplementary information.

The modified definition will be applicable to all federally insured credit unions regardless of size. Approximately 3,059 small credit unions could be affected by this amendment. An exemption for small credit unions from this definition would provide for an inaccurate reflection of the true financial condition of small credit unions. While the generally accepted accounting principles (GAAP) governing the establishment of an allowance for loan losses have remained constant, as a result of the savings and loan and banking industry crises, there has grown in accounting practice a greater emphasis on the allowance for loan losses representing inherent losses in the entire portfolio. This amendment must be applied to all federally insured credit unions regardless of size, because it ensures that the allowance for loan losses will be within the framework established by GAAP and, therefore, within the requirements of full and fair disclosure.

The only alternative to the amendment is to retain the present method of valuing the allowance for loan losses. This alternative is unacceptable considering the shifting emphasis in accounting practice. No other method, including the current method of valuation, is within the GAAP framework or meets the complete requirements for full and fair disclosure.

Executive Order 12612

Executive Order 12612 requires NCUA to consider the effect of its actions on state interest. Section 702.3 already applies to federally insured state-chartered credit unions. The amendment will affect the way these credit unions account for loan losses. The fact that the change will bring credit unions closer to GAAP

ameliorates any minimal effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements, Reserves.

By the National Credit Union Administration Board on December 15, 1992.
Becky Baker,
Secretary of the Board.

Accordingly, NCUA to amends 12 CFR part 702 follows:

PART 702—RESERVES

1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1762 and 1766.

2. Section 702.3(c)(2) is revised to read as follows:

§ 702.3 Full and fair disclosure required.

* * * * *

(c) * * *

(2) As a minimum, adjustments to the valuation allowance for loan losses shall be made prior to the distribution or posting of any dividend to the accounts of members so that the valuation allowance established fairly presents the value of loans and probable losses for all categories of loans. The valuation allowance must encompass:

- (i) Specifically identified doubtful or troubled loans;
- (ii) Pools of classified loans;
- (iii) Pools of loans (e.g., consumer, credit card, etc.); and
- (iv) A general portion for all other loans.

* * * * *

[FR Doc. 92-30924 Filed 12-21-92; 8:45 am]

BILLING CODE 7535-01-M

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

12 CFR Part 1102

[Docket No. AS92-4]

Appraisal Subcommittee; Appraisal Regulation; Freedom of Information Act Implementation

AGENCY: Appraisal Subcommittee, Federal Financial Institutions Examination Council.

ACTION: Final rule.

SUMMARY: The Appraisal Subcommittee ("ASC") of the Federal Financial Institutions Examination Council ("FFIEC") today announced the adoption of 12 CFR part 1102, subpart

D ("subpart" or "subpart D"), implementing the ASC's separate procedures pertaining to compliance with the Freedom of Information Act ("FOIA").

EFFECTIVE DATE: December 22, 1992.

FOR FURTHER INFORMATION CONTACT:

Edwin W. Baker, Executive Director, or Marc L. Weinberg, General Counsel, at (202) 634-6520, Appraisal Subcommittee, 2100 Pennsylvania Avenue NW., suite 200, Washington, DC 20037.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

On August 9, 1989, Congress adopted Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989¹ ("FIRREA"), including section 1102² of Title XI, which established the ASC and placed it within the FFIEC. The ASC consists of representatives appointed by the heads of the Federal Financial Institutions Regulatory Agencies ("regulatory agencies")³ and the Department of Housing and Urban Development. Congress intended Title XI of FIRREA and the ASC, the regulatory agencies and the Resolution Trust Corporation ("RTC") (collectively, "Agencies") to protect federal financial and public policy interests⁴ in real estate-related financial transactions⁵ requiring the services of an appraiser.⁶

The ASC has several statutory duties under Title XI. First, it must monitor the appraisal regulations adopted by the Agencies. Those regulations set out appraisal standards for federally related

transactions⁷ and define those federally related transactions requiring the services of a State certified or State licensed appraiser. Second, the ASC must monitor and review the practices, procedures, activities, and organizational structure of the Appraisal Foundation. Third, the ASC must monitor the certification and licensing programs for real estate appraisers in each State, territory, commonwealth, and the District of Columbia (collectively "States")⁸ and must review the State's compliance with the requirements of title XI. It also is authorized by title XI to take action against non-complying States.⁹ And lastly, each State with an appraiser certifying and licensing agency is responsible for transmitting to the ASC a roster of State certified and licensed appraisers who are eligible to perform appraisals in federally related transactions, along with an annual registry fee, and the ASC must maintain a national registry of these appraisers.¹⁰

II. Statutory Authority

FOIA¹¹ generally requires each Federal agency to make available to the public information regarding its organization and operation and rules of procedure and all substantive rules and interpretations of general applicability and statements of general policy.¹²

In addition, each agency, in accordance with published rules, must "make available for public inspection and copying—(A) final opinions * * * as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*; and (C) administrative staff manuals and instructions to staff that affect a member of the public. * * *"¹³ Certain documents and portions thereof, however, can be withheld from disclosure under one or more statutory exemptions set out in FOIA.¹⁴

Even though the ASC is within the FFIEC, the ASC is separately subject to

⁷ See section 1121(4) of Title XI, 12 U.S.C. 3350(4), which defines a "federally related transaction."

⁸ The ASC is required to "monitor State appraiser certifying and licensing agencies for the purpose of determining whether the * * * agency's policies, practices, and procedures are consistent with [Title XI]." Section 1118(a) of title XI, 12 U.S.C. 3347(a)(1990). See also, section 1103(a)(1) of title XI, 12 U.S.C. 3332(a)(1).

⁹ See section 1118 of title XI, 12 U.S.C. 3347.

¹⁰ Sections 1103(a)(3) and 1109(a) of title XI, 12 U.S.C. 3332(a)(1) and 3338(a), respectively.

¹¹ 5 U.S.C. 552.

¹² 5 U.S.C. 552(a)(1).

¹³ 5 U.S.C. 552(a)(2).

¹⁴ See 5 U.S.C. 552(b).

FOIA as an "agency" of the Federal Government. In 5 U.S.C. 552(e), an "agency" is defined, in pertinent part, as "any * * * establishment in the executive branch of the Government * * *, or any independent regulatory agency." This definition supplements the definition of "agency" in 5 U.S.C. 551(1), which includes "each authority of the Government of the United States, whether or not it is within or subject to review by another agency * * *, includ[ing] any * * * establishment in the executive branch of the Government * * *, or any independent regulatory agency." There is no doubt of the ASC's status, especially because the ASC is funded independently from the FFIEC as an appropriated entity of the Federal Government, has its own facilities and staff and has its own unique statutory mission and purpose under Federal law.

III. Description of the Subpart

In general, the ASC has determined to adopt by incorporation by reference the FFIEC's FOIA regulations set out in 12 CFR 1101.4 and 1101.5. These regulations were initially adopted by the FFIEC in 1980 and were amended by the FFIEC in 1988.¹⁵ On both occasions, the FFIEC's FOIA regulations were adopted after full exposure to public comment. The ASC is not incorporating by reference 12 CFR 1101.1, 1101.2 and 1101.3, which pertain respectively to the FFIEC's regulations' scope and purpose, authority and functions and organization and methods of operation. Instead, in compliance with 5 U.S.C. 552(a), the ASC is adopting 12 CFR 1102.300, 1102.301, 1102.302 and 1102.303, which are specifically tailored to the ASC.

The FFIEC's FOIA regulations which are being incorporated are unremarkable and provide the expected features of FOIA compliance. For example, 12 CFR 1101.4(a), which is incorporated by reference in new 12 CFR 1102.304(a), implements the general rule of document availability to the public in 5 U.S.C. 552 (a)(1) and (a)(2), and 12 CFR 1101.4(b), which is incorporated by reference in new 12 CFR 1102.304(a), implements FOIA's:

(1) Exemptions from general availability;

(2) Procedures for requesting and obtaining copies of documents and appealing initial adverse FOIA decisions; and

(3) Fee schedule for FOIA services.

New § 1102.304(a) also incorporates by reference 12 CFR 1101.5, which is entitled "Testimony and production of

¹⁵ See 45 FR 46794 (July 11, 1980), as amended at 53 FR 7341 (March 8, 1988).

¹ Pub. L. 101-73, 103 Stat. 511 (1989), as amended by Pub. L. 102-233, 105 Stat. 1761 (1991), Pub. L. 102-242, 105 Stat. 2236 (1991), Pub. L. 102-485, 106 Stat. 2771 (1992), and Pub. L. 102-550, 106 Stat. 3672 (1992).

² 12 U.S.C. 3310.

³ The regulatory agencies are the Board of Governors of the Federal Reserve System ("FRS"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA"). See section 1122(6) of title XI, 12 U.S.C. 3350(6).

⁴ Title XI's general purpose is "to provide that Federal financial and public policy interests * * * will be protected by requiring that [certain] real estate appraisals are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision." Section 1101 of title XI, 12 U.S.C. 3331.

⁵ See section 1121(5) of Title XI, 12 U.S.C. 3350(5), for the definition of "real estate-related financial transaction."

⁶ The agencies have adopted appraisal regulations that, among other things, clarify the phrase "requires the services of an appraiser." See 12 CFR part 34 (OCC); part 225, subpart G (FRS); part 323 (FDIC); part 584 (OTS); part 722 (NCUA); and part 1608 (1992) (RTC).

documents in response to subpoena, order, etc." This section generally provides that only persons with written authorization of the ASC: (1) Can testify, in court or otherwise (except before Congress in official matters), as a result of activities on behalf of the agency; or (2) can provide documents in compliance with judicial process. Persons not authorized to testify or produce documents must appear in court and respectfully state that he or she is unable to comply further with the subpoena or order by reason of this provision.

New § 1102.304(b) generally contains conforming, non-substantive changes designed to tailor 12 CFR 1101.4 and 1101.5, as incorporated by reference into subpart D of part 1102, to the ASC's separate administration and organizational structure. The only arguably substantive amendment to the FFIEC's rules, as incorporated into new § 1102.304(b), is a reduction of the per page copying fee from \$.25 to \$.15. The ASC believes that this \$.15 fee will be sufficient to recover its direct per page copying costs.

IV. Adoption Without Public Comment and Immediate Effectiveness

The ASC is adopting subpart D to provide the public with its disclosure rights under FOIA, as required by FOIA, with as little delay as possible. In that regard, the ASC has determined that good cause exists for the immediate effectiveness of subpart D without notice and public procedure ordinarily required by 5 U.S.C. 553 because such notice and public procedure and the usual 30-day delay of effectiveness is impracticable, unnecessary, or contrary to the public interest. By adopting subpart D and making it effective immediately, the ASC will put in place definitive ways for the public to obtain information from the ASC, an agency of the U.S. Government, as contemplated by FOIA. Moreover, the ASC believes that notice and public procedure is unnecessary because new subpart D's significant portions and features are identical to those in 12 CFR 1101.4 and 1101.5, which, as noted above, have been fully exposed to notice and public procedure by the FFIEC, of which the ASC is a part.

V. Conclusion

The ASC is adopting subpart D of part 1102 to implement FOIA without public comment, and subpart D is immediately effective upon publication of this release in the Federal Register.

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980,¹⁶ forms, reporting and recordkeeping requirements included in 12 CFR part 1102, subpart D, were submitted for review and approval to the Office of Management and Budget for review and approval on October 6, 1992.¹⁷ OMB approved subpart D on December 3, 1992, through December 31, 1995, and assigned it control number 3139-0006. Subpart D will fully implement FOIA at the ASC. The estimated number of respondents is 11, each submitting one response per year, with an estimated average reporting burden of .33 hour per response and an estimated annual reporting burden of 3.67 hours.

VII. Regulatory Flexibility Act Statement

Pursuant to section 605(b) of the Regulatory Flexibility Act, the ASC certifies that part 1102, subpart D, is not expected to have a significant economic impact on a substantial number of small entities. The subpart implements FOIA, which provides a general right to the public to obtain copies of certain records of a Federal agency. FOIA does not address business or corporate entities. Accordingly, a regulatory flexibility analysis is not required.

VIII. Executive Order 12291 Statement

The ASC has determined that subpart D does not constitute a "major rule" within the meaning of Executive Order 12291. Accordingly, a Regulatory Impact Analysis is not required on the grounds that this subpart:

- (1) Would not have an annual effect on the economy of \$100 million or more;
- (2) Would not result in a major increase in the cost of financial institution operations or governmental supervision; and
- (3) Would not have a significant adverse effect on competition (foreign or domestic), employment, investment, productivity or innovation, within the meaning of the Executive Order.

List of Subjects in 12 CFR Part 1102

Administrative practice and procedure, Appraisers, Banks, Banking, Freedom of information, Mortgages, Reporting and recordkeeping requirements.

Text of the Rule

Chapter XI, title 12, part 1102 of the Code of Federal Regulations is amended as set forth below:

1. New subpart D is added to read as follows:

PART 1102—APPRAISAL REGULATION

Subpart D—Description of Office, Procedures, Public Information

Sec.

- 1102.300 Authority, scope and purpose.
- 1102.301 Definitions.
- 1102.302 ASC authority and functions.
- 1102.303 Organization and methods of operation.
- 1102.304 General requirements, exemptions, procedures and other matters.

Subpart D—Description of Office, Procedures, Public Information

Authority: 12 U.S.C. 552.

§ 1102.300 Authority, scope and purpose.

This subpart implements the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, with respect to the Appraisal Subcommittee of the Federal Financial Institutions Examination Council and establishes related information disclosure procedures and fees.

§ 1102.301 Definitions.

- (a) ASC means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.
- (b) FFIEC means the Federal Financial Institutions Examination Council.

§ 1102.302 ASC authority and functions.

(a) *Authority.* The ASC was established on August 9, 1989, pursuant to title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended ("FIRREA"), 12 U.S.C. 3331 and 3310 through 3351. Title XI is intended "to provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision." 12 U.S.C. 3331.

(b) *Functions.* The ASC's statutory functions are generally set out in 12 U.S.C. 3332. In summary, the ASC must:

- (1) Monitor the requirements established by the States for the certification and licensing of individuals who are qualified to perform appraisals in connection with federally related transactions, including a code of professional responsibility;
- (2) Monitor the requirements of the Federal financial institutions regulatory agency and Resolution Trust

¹⁶ 44 U.S.C. 35.

¹⁷ 57 FR 46855 (October 13, 1992).

Corporation with respect to appraisal standards for federally related transactions and determinations as to which federally related transactions require the services of a State certified appraiser and which require the services of a State licensed appraiser;

(3) Monitor and review the practices, procedures, activities and organizational structure of the Appraisal Foundation; and

(4) Maintain a national registry of State certified and licensed appraisers eligible to perform appraisals in federally related transactions.

§ 1102.303 Organization and methods of operation.

(a) *Statutory and other guidelines.* Statutory requirements relating to the ASC's organization are stated in 12 U.S.C. 3310, 3333 and 3334. The ASC has adopted and published Rules of Operation guiding its administration, meetings and procedures. These Rules of Operation were published at 56 FR 28561 (June 21, 1991) and 56 FR 33451 (July 22, 1991).

(b) *ASC members and staff.* The ASC is composed of six members, each being designated by the head of their respective agencies: the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, National Credit Union Administration, Office of Thrift Supervision, and the Department of Housing and Urban Development. Administrative support and substantive program, policy and legal guidance for ASC activities are provided by a small, full-time, professional staff supervised by the Executive Director, Associate Director for Administration, Associate Director for Policy and Programs and the General Counsel.

(c) *FFIEC.* Title XI placed the ASC within FFIEC as a separate, appropriated agency of the United States Government with specific statutory responsibilities under Federal law.

(d) *ASC Address.* ASC offices are located at 2100 Pennsylvania Avenue NW., suite 200, Washington, DC 20037.

§ 1102.304 General requirements, exemptions, procedures and other matters.

(a) *In general.* The ASC, as part of the FFIEC, has determined that the FFIEC's regulations at 12 CFR 1101.4 and 1101.5

pertaining to the implementation of FOIA will guide the ASC's implementation of, and compliance with, FOIA. Therefore, the ASC is incorporating by reference into this subpart the FFIEC's regulations at 12 CFR 1101.4 and 1101.5, subject to the following conforming changes.

(b) *Exceptions.* Because the ASC is an appropriated U.S. Government agency with specific statutory responsibilities, the FFIEC's regulations at 12 CFR 1101.4 and 1101.5, as incorporated by reference into this subpart, are amended as follows:

(1) All references to the term "Council" in 12 CFR 1101.4 and 1101.5 shall be deleted, and the term "ASC" shall be inserted;

(2) All references to the term "Executive Secretary" in 12 CFR 1101.4 and 1101.5 shall be deleted, and the term "Executive Director" shall be inserted;

(3) All references to "§ 1101.3(e)" in 12 CFR 1101.4 (a) and (b)(3) (i) and (iii) shall be deleted, and new references to "§ 1102.303(d)" shall be inserted; and

(4) The reference to "\$.25" in 12 CFR 1101.4(b)(5)(ii)(C)(1) shall be deleted and "\$.15" shall be inserted.

By the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

Dated: December 14, 1992.

Fred D. Finkle,

Chairman.

[FR Doc. 92-30726 Filed 12-21-92; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Federal Aviation Administration

Federal Highway Administration

Federal Transit Administration

National Highway Traffic Safety Administration

Maritime Administration

Coast Guard

Research and Special Programs Administration

14 CFR Parts 61, 91, 121, 149, 153, 154, 199, 228, 235, 270, 292, 310a, 320, 326, 384, and 387

23 CFR Parts 1, 12, 17, 140, 470, 490, 642, 650, 655, 661, 666, 770, 920 and 922

33 CFR Parts 24, 105

46 CFR Parts 154a, 237, 250, 262, 278, 279, 292, 294, 310, 316, 318, 319, 320, 321, 322, 323, 333, and 334

49 CFR Parts 81, 101, 527, 571, 590, 603, 623, 635 and 670

[Docket 48146; Notice 92-28]

RIN No. 2105-AB66

Removal of Obsolete and Redundant Regulations

AGENCY: Office of the Secretary, Federal Aviation Administration, Federal Highway Administration, Federal Transit Administration, National Highway Traffic Safety Administration, Maritime Administration, United States Coast Guard, and Research and Special Programs Administration, DOT.

ACTION: Final rule.

SUMMARY: In connection with the President's Regulatory Moratorium and Review, the Department of Transportation has reviewed all its existing regulations. This review identified numerous regulations that are obsolete, redundant, or can be reissued as non-regulatory guidance. This document removes these rules from the Code of Federal Regulations.

DATES: This final rule is effective on December 22, 1992. Petitions for reconsideration of the final rule must be received by January 21, 1993.

ADDRESSES: Petitions for reconsideration should be sent to Docket Clerk, Att: Docket No. 48146, Department of Transportation, 400 7th Street, SW., room 4107, Washington, DC 20590. For

the convenience of persons who wish to review the docket, it is requested that petitions be sent in duplicate. Persons who wish to receive acknowledgment of their petitions should enclose a stamped, self-addressed postcard with their petition. The docket clerk will date-stamp the postcard and return it to the sender. Petitions may be reviewed at the above address from 9 a.m. through 5:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., room 10424, Washington, DC 20590, 202-366-9306.

SUPPLEMENTARY INFORMATION:

The Department published a notice of proposed rulemaking (NPRM) in the *Federal Register* on May 20, 1992 (57 FR 21362) in which it proposed these removals, with a 45-day comment period that closed on July 6, 1992. The Department received nineteen comments in response to the NPRM.

Background

On January 28, 1992, President Bush directed all Federal agencies to review their existing regulations, in order to determine whether changes should be made to promote economic growth, create jobs, or eliminate unnecessary costs or other burdens on the economy. The Department of Transportation has done so. In the course of this review, the Department identified various regulations that were obsolete (e.g., referred to organizations, programs, or requirements that no longer exist), redundant (e.g., duplicate other DOT regulations), or that can be deleted and reissued as non-regulatory guidance. By removing these unnecessary regulations, the Department substantially reduces the size of its portion of the Code of Federal Regulations, and thus reduces the administrative burdens on the public.

Discussion of Comments

Virtually all of the comments received by the Department concerned proposed deletions of Federal Highway Administration (FHWA) regulations. Several commenters, including the U.S. Department of Labor (DOL), opposed removal of the Transportation of Migrant Workers regulations contained in 49 CFR part 398. They commented that the standards in part 398 are important to the welfare of tens of thousand of migrant farm workers. DOL enforces the Migrant and Seasonal Agricultural Protection Act, and has promulgated regulations concerning the

transportation of migrant farm workers. However, the Department agrees with the commenters that not all of the standards in 49 CFR part 398 are contained in the DOL regulations and that the Department's continued guidance in this area is necessary to ensure the maximum protection for migrant workers. Therefore, the Department will not remove part 398.

The FHWA proposal that attracted the greatest number of comments was the proposed removal of a number of rules from the Federal Motor Carrier Safety (FMCS) regulations. Many of the rules listed in the NPRM for removal are related to a rulemaking currently under development concerning a proposed change to the jurisdictional weight threshold for a "commercial motor vehicle" (CMV) from a gross vehicle weight rating (GVWR) of 10,001 pounds or more to a GVWR of 26,001 pounds or more. If this definition were adopted, many of the current rules, which were proposed for deletion in the NPRM, would be obsolete, redundant, or otherwise unnecessary. The draft regulation redefining CMV is not yet ready for publication, however. Since that rulemaking provides the factual and legal context for most of the proposed FHWA deletions from Title 49 listed in the NPRM, the Department is not now taking final action with respect to all of the FHWA proposed deletions from Title 49. FHWA will address the comments concerning specific FMCS provisions as necessary in the planned rule redefining CMV. The Department may delete the FMCS rules in question simultaneous with or following the issuance of a formal CMV rule.

In addition to commenting on the FHWA proposals, one commenter expressed concern about the proposed deletion of the Federal Transit Administration (FTA) rule in 49 CFR part 603 regarding claims under the Federal Claims Collection Act. The FTA rule duplicates the Department's regulation on the same topic at 48 CFR part 89, which became effective in early 1989. Accordingly, the FTA rule is redundant and is removed. Two commenters objected to the proposed removal of 49 CFR part 590, the Motor Vehicle Emission Inspections rule and 49 CFR 571.100, the Controls and Displays rule. The National Highway Traffic Safety Administration intended part 590 to be used by State diagnostic inspection demonstration projects. Since the demonstration program has now ended, this part currently has no effect and therefore is removed. The Controls and Displays rule also is removed because it is obsolete. Prior to July 1, 1989, vehicle manufacturers had

the option to comply with the controls and displays requirements contained in either 49 CFR 571.100 or 49 CFR 571.101. Effective July 1, 1989, however, manufacturers are required to comply with the controls and display requirements contained in 49 CFR 597.101. Thus, § 571.100 no longer has any relevance.

One commenter expressed concern about the proposed removal of 49 CFR part 101, the Research and Special Programs Administration's Cargo Security Advisory Standards. As the commenter noted, these standards are guidelines and not binding regulatory requirements. Publication of these guidelines in the Code of Federal Regulations gives the impression that they are binding, which could burden businesses that are attempting to comply with the standards. Accordingly, the Department is removing this section from the regulations.

Several commenters noted that the NPRM did not explain the precise reason for the proposed removal of each regulation listed in the NPRM. As the Department explained in the NPRM and above, only those regulations that are obsolete, redundant or can be published in a non-regulatory format are being deleted. Since the Department has accommodated all of the comments filed by the public in response to the NPRM, it has decided to proceed with the removal of those rules which were not the subject of public comment based on the general rationale provided above.

The following is a list, by DOT operating administration, of the regulations the Department hereby removes:

Office of the Secretary

- Reinvestment of gains derived from the sale or other disposition of flight equipment (14 CFR part 235)
- Criteria for designating eligible EAS points (14 CFR part 270)
- Classification and exemption of Alaskan air carriers (14 CFR part 292)
- Cross-reference to Privacy Act for Aviation Proceedings. (14 CFR part 310a)
- Japanese charter authorization proceedings (14 CFR part 320)
- Procedures for bumping subsidized air carriers from eligible points (14 CFR part 326)
- CAB rules of internal organization (14 CFR part 384)
- CAB operations during emergencies (14 CFR part 387)
- Recommendations to the President under section 801 of the Federal Aviation Act (49 CFR part 81)

Federal Aviation Administration

SFAR 21, which provides sanctions and recordkeeping requirements for persons operating to Southern Rhodesia

SFAR 44-5 and 44-6, which responded to the air traffic controllers' strike in 1981

SFAR 47, which prescribes rules for special authorization to fly certain noise-restricted aircraft

SFAR 57, which barred the transport of the remains of Ferdinand Marcos from the United States to the Philippines

SFAR 61, which formerly restricted certain cargo flights between the United States and Iraq or Kuwait

SFAR 34, which established procedures to apply for compensation for required security measures in foreign air transportation

Conversion to New System of Flight Instructor Ratings (14 CFR 61.201(b)-(g))

Parachute Lofts (14 CFR part 149)

Acquisition of U.S. Land for Public Airports (14 CFR part 153)

Acquisition of U.S. land for public airports under the Airport and Airway Development Act of 1970 (14 CFR part 154)

Aircraft Loan Guarantee Program (14 CFR part 199)

Federal Highway Administration

General Management (23 CFR 1.4, 1.11(d), 1.31, 1.34, 1.37, and 1.38)

Single Audit Requirements (23 CFR part 12)

Recordkeeping and Retention Requirements for Federal-Aid Highway Records of State Highway Agencies (23 CFR part 17)

Reimbursement Vouchers (23 CFR part 140, subpart A)

Priority Primary Route Selection (23 CFR part 470, subpart C)

Special Programs; Economic Growth Center Development Highways (23 CFR part 490)

Secondary Road Plan (23 CFR part 642)

Water Supply and Sewage Treatment at Safety Rest Areas (23 CFR part 650, subpart E)

Concrete Bridge Decks (23 CFR part 650, subpart F)

Topics (23 CFR part 655, subpart A)

Motorist Aid Systems (23 CFR part 655, subpart G)

Great River Road (23 CFR part 661)

Defense Bridges and Critical Highway Facilities (23 CFR part 666)

Air Quality, Conformity, and Priority Procedures (23 CFR part 770)

Pavement Marking Demonstration Program (23 CFR part 920)

Safer Off-System Roads Program (23 CFR part 922)

National Highway Traffic Safety Administration

Reduction of Passenger Automobile Average Fuel Economy Standards (49 CFR part 527)

Controls and displays (49 CFR part 571.100)

Motor Vehicle Emission Inspections (49 CFR part 590)

Maritime Administration

Repairs to Vessels Under Bareboat Charter (46 CFR part 237)

Participation By Vessels Built With Construction-Differential Subsidy in the Carriage of Domestic Trade (46 CFR part 250)

Minimum-wage, Minimum Manning and Reasonable Working Conditions (46 CFR part 262)

Employment in the Foreign Trade of Liquid and Dry Bulk Vessels Constructed With the Aid of Construction-Differential Subsidy (CDS) (46 CFR part 278)

Operating-Differential Subsidy for Bulk Cargo Vessels in United States Foreign Commerce with Great Lakes, Connecting Rivers, St. Lawrence River, and Gulf of St. Lawrence (46 CFR part 279)

Procedure to be followed by Operators in the Rendition to the Maritime Administration of Annual and Final Accountings (46 CFR part 292)

Operating-Differential Subsidy for Bulk Cargo Vessels Engaged in Carrying Bulk Raw and Processed Agricultural Commodities from the United States to the Union of Soviet Socialist Republics (46 CFR part 294)

Regulations for the Government of the U.S. Maritime Service (46 CFR part 310, subpart B)

Application Procedures for Agents (46 CFR part 316)

Compensation Payable to Agents, General Agents and Berth Agents (46 CFR part 318)

Duties of Berth Agents and General Agents (46 CFR part 319)

Certificate of Ownership and Operation for General Agency Vessels (46 CFR part 320)

Authority of General Agents to Provide for American Merchant Marine Library Service (46 CFR part 321)

Applicability of Regulations of Former Maritime Commission and War Shipping Administration to National Shipping Authority and Allowability of Expenses Under Service Agreements with NSA (46 CFR part 322)

Maximum Brokerage Commission Applicable to NSA Vessels (46 CFR part 323)

Authority and Responsibility of General Agents to Decommission Tankers to

be Withdrawn from Operation and Placed in the Reserve Fleet (46 CFR part 333)

Radar Observer Certificates, Ship's Safety and Use of Radar (46 CFR part 334)

United States Coast Guard

Nondiscrimination in Federally Assisted Programs of the United States Coast Guard—Effectuation of Title VI of the Civil Rights Act of 1964. (33 CFR part 24)

North Atlantic Passenger Routes. (33 CFR part 105)

Special Interim Regulations for Issuance of Letters of Compliance to Barges and Existing Liquefied Gas Vessels. (46 CFR part 154a)

Research and Special Programs Administration

Embargoes on Property (14 CFR part 228)

Cargo Security Advisory Standards (49 CFR part 101)

Federal Transit Administration

Federal Claims Collection Act (49 CFR part 603)

Joint FTA/FHWA Air Quality Requirements (49 CFR part 623)

Section 5 Requirements (49 CFR part 635)

Transfer Commuter Services (49 CFR part 670)

Regulatory Analyses and Notices Effective Date

Because this final rule eliminates unnecessary rules that could be confusing to the public, the Department has determined that good cause exists under 5 U.S.C. 553(d) for making this rule effective in less than 30 days after publication.

This final rule is not major under the terms of Executive Order 12291 or significant under the Department of Transportation's Regulatory Policies and Procedures. It does not impose costs on anyone, and further regulatory evaluation is not needed. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 and it has been determined this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism assessment. Because there are no costs involved and the benefits are not significant, the Department certifies that the final rule will not have a significant economic effect on a substantial number of small entities.

Issued this 23rd day of Nov., 1992, at Washington DC.

Andrew H. Card, Jr.,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation is taking the following actions:

1. The authority for the final action is 49 CFR part 322.

1a. The authority for 14 CFR part 61 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449; Jan 12, 1983).

1b. The authority for 23 CFR part 1 continues to read as follows:

Authority: 23 U.S.C. 315; 49 CFR part 1.48(b.)

1c. The authority for 23 CFR part 140 continues to read as follows:

Authority: 23 U.S.C. 101(e), 114(a), 120, 121, 122 and 315; and 49 CFR 1.48(b).

1d. The authority for 23 CFR part 470A continues to read as follows:

Authority: 23 U.S.C. 103(b)(2), (103(c)(2), 103(d)(2), 103(e)(1), (103(e)(3), 103(f), and 315; 49 CFR 1.48(b)(2) and (b)(35), unless otherwise noted.

1e. The authority for 23 CFR part 470C continues to read as follows:

Authority: 23 U.S.C. 147 and 315; 49 CFR 1.48(b)(28) and (35).

1f. The authority for 23 CFR part 650 continues to read as follows:

Authority: 23 U.S.C.; 109(a) and (b), 144, 151, 351, 23 CFR 1.32; 49 CFR 1.48(b); E.O. 11988-Floodplan Management, May 24, 1977 (42 FR 26951); Department of Transportation Order 5650.2 dated April 23, 1979 (44 FR 24878); sec. 161 of Public Law 97-424, 96 Stat. 2097, 3135; Public Law 97-134, 95 Stat. 1699; and 33 U.S.C. 401, 491 et seq., 511 et seq.

1g. The authority for 23 CFR part 655 continues to read as follows:

Authority: 23 U.S.C. 101(a) 104, 105, 109(d), 114(a), 135, 217, 307, 315, and 402(a); 23 CFR 1.32 and 1204.4; and 48 CFR 1.48(b).

1h. The authority for 46 CFR part 310 is revised to read as follows:

Authority: 46 App. U.S.C. 1295; 49 CFR 1.66.

1. The authority for 49 CFR part 571 continues to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50.

TITLE 14

PARTS 61, 91, 121—[AMENDED]

PARTS 149, 153, 154, 199, 228, 235, 270, 292, 310a, 320, 326, 384, 387 AND SUBCHAPTER O—[REMOVED]

2. In title 14 of the Code of Federal Regulations, remove parts 149, 153, 154, 199 and subchapter O of chapter I, 228, 235, 270, 292, 310a, 320, 326, 384, and 387; paragraphs (b) through (g) and the designation for paragraph (a) in § 61.201; and Special Federal Aviation Regulations 21, 44-5, 44-6, 47, 57, and 61 in 14 CFR part 91 and Special Federal Aviation Regulation 34 in 14 CFR part 121.

TITLE 23

PARTS 12, 17, 490, 642, 661, 666, 770, 920, 922—[REMOVED]

PARTS 1, 140, 470, 650, 655—[AMENDED]

3. In title 23 of the Code of Federal Regulations, remove and reserve subpart A of part 140, subpart C of part 470, subparts E and F of part 650, subparts A and G of part 655, and remove parts 12, 17, 490, 642, 661, 666, 770, 920, and 922.

§§ 1.4, 1.31, 1.34, 1.37, 1.38 [Removed and Reserved]

§ 1.11 [Amended]

4. In title 23 of the Code of Federal Regulations, in part 1, remove §§ 1.4, 1.31, 1.34, 1.37, and 1.38, and remove and reserve § 1.11(d).

TITLE 33

PARTS 24, 105—[REMOVED]

5. In title 33 of the Code of Federal Regulations, remove parts 24 and 105 and remove and reserve subchapter H of chapter I.

TITLE 46

PARTS 154a, 237, 250, 262, 278, 279, 292, 294, 316, 318, 319, 320, 321, 322, 323, 333, 334—[REMOVED]

PART 310—[AMENDED]

6. In title 46 of the Code of Federal Regulations, remove parts 154a, 237, 250, 262, 278, 279, 292, 294, 316, 318, 319, 320, 321, 322, 323, 333, and 334, and remove and reserve subpart B of part 310.

TITLE 49

PARTS 81, 101, 527, 590, 603, 623, 635, 670—[REMOVED]

PART 571—[AMENDED]

CHAPTER I, SUBCHAPTER A—[REMOVED AND RESERVED]

7. In title 49 of the Code of Federal Regulations, remove parts 81, 101, 527, 590, 603, 623, 635, and 670 and remove and reserve Subchapter A of Chapter I.

§ 571.100 [Removed]

8. In title 49 of the Code of Federal Regulations, part 571, remove § 571.100. [FR Doc. 92-29990 Filed 12-21-92; 8:45 am] BILLING CODE 4910-62-M

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 92-AEA-02]

Alteration of Transition Area; College Park, MD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document contains a correction to the final rule published in the Federal Register on August 25, 1992. The final rule modifies the 700 foot Transition Area established at College Park, MD, due to the development of a new instrument approach procedure to College Park Airport, College Park, MD. This correction updates the coordinates and altitude used for the base of the Transition Area in the description. EFFECTIVE DATE: 0901 u.t.c. December 10, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Designated Airspace Specialist, System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-0857

SUPPLEMENTARY INFORMATION:

History

Federal Register Document 92-20346, Airspace Docket No. 92-AEA-02, published on August 25, 1992 (57 FR 38436), revised the 700 foot Transition Area at College Park, MD. The coordinates used in the description were based upon old geographic data (NAD 27 instead of NAD 83) and the base of the Transition Area was incorrectly stated. This action corrects that error.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the publication on August 25, 1992 (Federal Register Document 92-20346) and the description in FAA Order 7400.7A, dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1, are corrected as follows:

§71.1 [Corrected]

1. On page 38436, column 3, and page 38437, column 1, the description for the College Park, MD, Control Zone is corrected to read as follows:

Section 71.181 Designation of Transition Areas

* * * * *
AEA MD TA College Park, MD [Revised]
College Park Airport, MD (lat. 38°58'50" N.,
long. 76°55'21" W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the College Park Airport and within 2 miles either side of a 303° (T) 313° (M) bearing extending from a point located at lat. 38°58'56" N., long. 76°55'28" W., extending northwest from said point and the 6.4-mile radius to 9.1 miles northwest of said point.

* * * * *
Issued in Jamaica, New York, on December 8, 1992.

Gary W. Tucker,
Manager, Air Traffic Division.
[FR Doc. 92-30998 Filed 12-21-92; 8:45 am]
BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 90-AEA-03]

Alteration of Control Zone and Transition Area; Du Bois, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Control Zone and 700 foot Transition Area established at Du Bois, PA. This action is due to unsuccessful flight checks of a relocated Nondirectional Radio Beacon (NDB) and reflects the actual amount of controlled airspace needed by the FAA to contain aircraft operating under instrument flight rules. **EFFECTIVE DATE:** 0901 u.t.c. February 4, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Designated Airspace Specialist, System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building # 111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-0857.

SUPPLEMENTARY INFORMATION:

History

On September 19, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise the control zone and 700 foot transition area located at Du Bois, PA, due to unsuccessful flight checks of a relocated NDB (57 FR 44713). The proposed action was to modify the controlled airspace needed for aircraft operations conducted under instrument flight rules.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received on the proposal. Except for editorial changes, this amendment is the same as that proposed in the notice. The coordinates for this airspace docket are based on North American Datum 83. Control Zones and Transition Areas are published in §§ 71.171 and 71.181, respectively, of FAA Order 7400.7A dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The Control Zone and Transition Area listed in this document will be published subsequently in the Handbook.

The Rule

This amendment to part 71 of the Federal Aviation Regulations revises the Control Zone and 700 foot Transition Area located at Du Bois, PA, due to unsuccessful flight checks of a relocated NDB.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones, Incorporation by reference, Transition areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.171 Designation of Control Zones

* * * * *
AEA PA CZ Du Bois, PA [Revised]
Du Bois-Jefferson County Airport, Du Bois,
PA (lat. 41°10'42" N., long. 78°53'55" W.)
Clarion, PA, VORTAC (lat. 41°08'47" N.,
long. 79°27'29" W.)
Du Bois ILS northeast course OM (lat.
41°13'11" N., long. 78°48'08" W.)

That airspace extending upward from the surface within a 4-mile radius of the Du Bois-Jefferson County Airport and within 2.6 miles each side of the Du Bois-Jefferson County Airport ILS localizer northeast course, extending from the 4-mile radius to 7.4 miles northeast of the OM and within 2.2 miles each side of the Clarion, PA, VORTAC 086° (T) 092° (M) radial, extending from the 4-mile radius zone to 20 miles east of the VORTAC and within 2.2 miles each side of a 242° (T) 248° (M) bearing from a point at lat. 41°10'30" N., long. 78°54'29" W., extending from said point to 4.8 miles southwest of said point.

* * * * *
Section 71.181 Designation of Transition Areas

* * * * *
AEA PA TA Du Bois, PA [Revised]
Du Bois-Jefferson County Airport, Du Bois,
PA (lat. 41°10'42" N., long. 78°53'55" W.)
Du Bois ILS localizer northeast course (lat.
41°10'28" N., long. 78°54'31" W.)
Du Bois ILS northeast course OM (lat.
41°13'11" N., long. 78°48'08" W.)

That airspace extending upward from 700 feet above the surface within a 8.5-mile radius of the Du Bois-Jefferson County Airport and within 3.1 miles either side of the Du Bois ILS localizer northeast course extending from the 8.5-mile radius to 10 miles northeast of the OM.

* * * * *

Issued in Jamaica, New York, on December 8, 1992.

Gary W. Tucker.

Manager, Air Traffic Division.

[FR Doc. 92-30999 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 91-ASW-25]

Revision of Transition Area; Gruver, TX; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Correction to final rule.

SUMMARY: This action amends the legal description of the Transition Area located at Gruver, TX, by converting the mileages from statute to nautical and by updating the Gruver Municipal Airport coordinates from North American Datum 27 to North American Datum 83.

EFFECTIVE DATE: February 4, 1993.

FOR FURTHER INFORMATION CONTACT:

Alvin E. DeVane, System Management Branch, Air Traffic Division, Southwest Region, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76 193-0530, telephone (817) 624-5535.

SUPPLEMENTARY INFORMATION:

History

Since the final rule establishing a transition area at Gruver, Texas, was published in the *Federal Register* on August 25, 1992 (57 FR 38437), the criteria used in the development of transition areas have changed. The new criteria became effective on October 15, 1992. As a result of these changes, mileage will be expressed in terms of nautical miles rather than statute miles. This action amends the legal description of the Gruver, Texas, transition area in this final rule to conform to this new standard. Additionally, the Gruver Municipal Airport coordinates in the proposal were North American Datum 27. This action revises these coordinates to North American Datum 83.

Correction of Publication

Accordingly, the publication on August 25, 1992, of the final rule that was the subject of Federal Register Docket 92-19112, is corrected as follows:

§ 71.1 [Corrected]

1. On page 38437, in the second column, the paragraph beneath the heading "Gruver, TX [Revised]" is corrected to read as follows:

That airspace extending upward from 700 feet above the surface within a 6.5-mile

radius of the Gruver Municipal Airport (latitude 36°14'01" N., longitude 101°25'58" W.), excluding that airspace within the Spearman, TX, transition area.

Issued in Fort Worth, TX, on December 9, 1992.

Larry L. Craig,

Manager, Air Traffic Division Southwest Region.

[FR Doc. 92-31000 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 92-ASO-3]

Alteration of VOR Federal Airways and Revocation of V-515; TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action alters the descriptions of six Very High Frequency Omnidirectional Range (VOR) Federal airways and revokes one VOR Federal airway located in the vicinity of Nashville, TN. The Nashville VOR has been relocated north of its former location and the airway structure in the Nashville area has been realigned to reduce congestion within the terminal area and to decrease the en route traffic in the arrival and departure areas. This amendment also reflects the action taken in Airspace Docket Nos. 92-ASO-6 and 92-ASO-7, which changes the names of the Knoxville, TN, VOR to the Volunteer, TN, VOR and the Chattanooga, TN, VOR to the Choo Choo, GA, VOR, respectively.

EFFECTIVE DATE: 0901 u.t.c., February 4, 1993.

FOR FURTHER INFORMATION CONTACT:

Lewis W. Still, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9250.

SUPPLEMENTARY INFORMATION:

History

On September 2, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter the descriptions of six VOR Federal airways and to revoke one airway located in the vicinity of Nashville, TN (57 FR 40151). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments

objecting to the proposal were received. Except for editorial changes, the removal of the airspace exclusion in V-136 concerning the Gamecock A Military Operations Area (MOA), and the inclusion of the name changes to the Chattanooga, TN, VOR to the Choo Choo, GA, VOR and the Knoxville, TN, VOR to the Volunteer, TN, VOR, this amendment is the same as that proposed in the notice. Domestic VOR Federal Airways are published in § 71.123 of FAA Order 7400.7A dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The airways listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations alters the descriptions of six VOR Federal airways and revokes one airway located in the vicinity of Nashville, TN. The Nashville VOR has been relocated north of its former location. The airway structure in the Nashville area will be realigned to reduce congestion within the terminal area and to decrease the en route traffic in the arrival and departure areas. The description of V-136 no longer contains the airspace exclusion concerning the Gamecock A MOA. The airspace for the airway remains in existence even if the Gamecock A MOA is activated, air traffic control may be unable to clear nonparticipating aircraft through the airspace when the MOA is activated.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter than will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Domestic VOR Federal airways, Incorporation by reference.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9585, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.123 Domestic VOR Federal Airways

* * * * *

V-5 [Revised]

From Pecan, GA, via Vienna, GA; Dublin, GA; Athens, GA; INT Athens 340° and Electric City, SC, 274° radials; INT Electric City 274° and Choo Choo, GA, 127° radials; Choo Choo; Bowling Green, KY; New Hope, KY; Louisville, KY; Cincinnati, OH; Appleton, OH; Mansfield, OH; Dryer, OH; London, ON, Canada. The airspace within Canada is excluded.

* * * * *

V-16 [Revised]

From Los Angeles, CA; Paradise, CA; Palm Springs, CA; Blythe, CA; Buckays, AZ; Phoenix, AZ; INT Phoenix 155° and Stanfield, AZ, 105° radials; Tucson, AZ; Cochise, AZ; Columbus, NM; El Paso, TX; Salt Flat, TX; Wink, TX; Wink 066° and Big Spring, TX, 260° radials; Big Spring; Abilene, TX; Millsap, TX; Acton, TX; Scurry, TX; Quitman, TX; Texarkana, AR; Pine Bluff, AR; Holly Springs, MS; Jacks Creek, TN; Shelbyville, TN; Hinch Mountain, TN; Volunteer, TN; Holston Mountain, TN; Pulaski, VA; Roanoke, VA; Lynchburg, VA; Flat Rock, VA; Richmond, VA; INT Richmond 039° and Patuxent, MD, 228° radials; Patuxent; Smyrna, DE; Cedar Lake, NJ; Coyle, NJ; INT Coyle 036° and Kennedy, NY, 209° radials; Kennedy; Deer Park, NY; Calverton, NY; Norwich, CT; Boston, MA. The airspace within Mexico and the airspace below 2,000 feet MSL outside the United States is excluded. The airspace within Restricted Areas R-5002A, R-5002C, and R-5002D is excluded during their times of use. The airspace within Restricted Areas R-4005 and R-4006 is excluded.

* * * * *

V-52 [Revised]

From Des Moines, IA; Ottumwa, IA; Quincy, IL; St. Louis, MO; Troy, IL; INT Troy 099° and Pocket City, IN, 311° radials; Pocket City; Central City, KY; Bowling Green, KY; to Livingston, TN.

* * * * *

V-124 [Revised]

From Blue Ridge, TX, via Paris, TX; Hot Springs, AR; Little Rock, AR; Gilmore, AR; Jacks Creek, TN; to Graham, TN.

* * * * *

V-136 [Revised]

From Hinch Mountain, TN; INT Hinch Mountain 100° and Volunteer, TN, 243° radials; Volunteer; Snowbird, TN; Holston Mountain, TN; Pulaski, VA; INT Pulaski 094° and South Boston, VA, 295° radials; South Boston; Raleigh-Durham, NC; Fayetteville, NC; to Grand Strand, SC.

* * * * *

V-362 [Revised]

From Brunswick, GA, via Alma, GA; Vienna, GA; to Macon, GA.

* * * * *

V-515 [Removed]

* * * * *

Issued in Washington, DC, on December 11, 1992.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 92-31004 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 806

[Docket No. 921100-2300]

RIN 0691-AA08

Direct Investment Surveys: BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1992

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: These final rules revise 15 CFR 806.17 to set forth reporting requirements for the BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1992, and to delete the rules now in § 806.17, which were for the last benchmark survey covering 1987. Section 4(b) of the International Investment and Trade in Services Survey Act requires that a benchmark survey of foreign direct investment in the United States be conducted covering 1980, 1987, and every fifth year thereafter.

Forms for the 1992 benchmark survey are scheduled to be mailed out at the end of February 1993. Completed reports will be due to BEA on May 31, 1993.

EFFECTIVE DATE: These rules will be effective January 21, 1993.

FOR FURTHER INFORMATION CONTACT: Betty L. Barker, Chief, International

Investment Division (BE-50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 523-0659.

SUPPLEMENTARY INFORMATION: In the September 18, 1992 Federal Register, Volume 57, No. 182, 57 FR 43158, the Bureau of Economic Analysis published a notice of proposed rulemaking to revise 15 CFR 806.17 to set forth reporting requirements for the BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1992. No comments on the proposed rule were received. Thus, this final rule is the same as the proposed rule.

The benchmark survey is to be conducted by the Bureau of Economic Analysis, U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act, hereinafter, "the Act." Section 4(b) of the Act, as amended, requires that "With respect to foreign direct investment in the United States, the President shall conduct a benchmark survey covering year 1980, a benchmark survey covering year 1987, and benchmark surveys covering every fifth year thereafter * * * Reporting in the survey is mandatory. The responsibility for conducting benchmark surveys of foreign direct investment in the United States has been delegated to the Secretary of Commerce, who has redelegated it to the Bureau of Economic Analysis (BEA).

The benchmark surveys are BEA's censuses, intended to cover the universe of foreign direct investment in the United States in value terms. Foreign direct investment in the United States is defined as the ownership or control, directly or indirectly, by one foreign person of 10 percent or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.

The purpose of the benchmark survey is to obtain data on the amount, types, and financial and operating characteristics of foreign direct investment in the United States. The data from the survey will be used to measure the economic significance of such investment and to analyze its effects on the U.S. economy. They will also be used in formulating, and assessing the impact of, U.S. policy on foreign direct investment. They will provide benchmarks for deriving current universe estimates of direct investment from sample data collected in other BEA surveys. In particular, they will serve as benchmarks for the quarterly direct investment estimates included in the U.S. international transactions and

national income and product accounts, and for annual estimates of the foreign direct investment position in the United States and of the operations of the U.S. affiliates of foreign companies.

The benchmark surveys are also the most comprehensive of BEA's surveys in terms of subject matter in order that they obtain the detailed information on foreign direct investment needed for policy purposes. As specified in the Act, policy areas of particular interest that should be addressed by the survey include, among other things, trade in both goods and services, employment and employee compensation, taxes, and technology.

The survey consists of an instruction booklet, a claim for not filing the BE-12, and the following report forms:

1. Form BE-12(LF) (Long Form) for reporting by nonbank U.S. affiliates with assets, sales, or net income of more than \$50 million (positive or negative);
2. Form BE-12(SF) (Short Form) for reporting by nonbank U.S. affiliates with assets, sales, or net income of more than \$1 million, but not more than \$50 million (positive or negative);
3. Form BE-12 Bank for reporting by U.S. affiliates that are banks with assets, sales, or net income of more than \$1 million (positive or negative).

Although the survey is intended to cover the universe of foreign direct investment in the United States, in order to minimize the reporting burden, U.S. affiliates with assets, sales, and net income each equal to or less than \$1 million (positive or negative) are exempt from reporting on Forms BE-12(LF), BE-12(SF), and BE-12 Bank, but are required to file, on Form BE-12(X), a claim for exemption from filing in the benchmark survey.

Two changes from the last (1987) survey have been made to the 1992 survey, primarily to minimize reporting burden on respondents. They are:

1. Nonbank affiliates with assets, sales, or net income greater than \$50 million (positive or negative) are required to file the BE-12 long form; all other nonbank affiliates file the BE-12 short form. In the 1987 benchmark survey, the long-form exemption level was \$20 million. This change shifts approximately 1,600 affiliates from the long form to the short form, reducing both reporting and editing burden from what it would otherwise be. Because of growth in the foreign direct investment universe since 1987, however, the total number of long forms to be filed should remain roughly the same as in the 1987 survey.

2. A new BE-12 Bank form was designed for reporting by all foreign-owned U.S. banks. In the 1987

benchmark survey, bank affiliates reported on the BE-12 short form, as did nonbank affiliates below a certain size. This approach did not work well because short form questions were not written with banks in mind. The new, separate bank form has questions that are specifically targeted at banks, which should substantially reduce the need for follow-up contact with bank reporters. In addition, BEA has broadened the definition of "banking" to include savings institutions and credit unions, to be consistent with the 1987 revision of the Standard Industrial Classification System.

Paper Reduction Act

The collection of information required in these final rules has been approved by OBM (OMB No. 0608-0042).

The public reporting burden for this collection of information is estimated to vary from 2 to 750 hours per response, with an average of 15.5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Comments regarding the burden estimate, including suggestions for reducing this burden, may be sent to the Director, Bureau of Economic Analysis (BE-1), U.S. Department of Commerce, Washington, DC 20230; and to the Office of Management and Budget, Paperwork Reduction Project 0608-0042, Washington, DC 20503.

Executive Order 12291

BEA has determined that these final rules are not "major" as defined in E.O. 12291 because they are not likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12612

These final rules do not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 12612.

Regulatory Flexibility Act

The General Counsel, Department of Commerce, has certified to the Chief

Counsel for Advocacy, Small Business Administration, under provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this final rulemaking will not have a significant economic impact on a substantial number of small entities. Most small businesses are not foreign owned, and many that are will not be required to report in the benchmark survey because their assets, sales, and net income are each equal to or less than the \$1 million exemption level below which reporting is not required. Also, companies with assets, sales, or net income above \$1 million, but not above \$50 million (positive or negative), will report on the abbreviated BE-12 short form, rather than on the BE-12 long form. This provision significantly reduces the reporting burden on smaller companies.

List of Subjects in 15 CFR Part 806

Balance of payments, Economic statistics, Foreign investment in the United States, Reporting requirements.

Dated: November 9, 1992.

Carol S. Carson,

Director, Bureau of Economic Analysis.

For the reasons set forth in the preamble, 15 CFR part 806 is amended as follows:

PART 806—DIRECT INVESTMENT SURVEYS

1. The authority citation for 15 CFR part 806 continues to read as follows:

Authority: 5 U.S.C. 301, 22 U.S.C. 3101-3108, and E.O. 11961, as amended.

2. Section 806.17 is revised to read as follows:

§ 806.17 Rules and regulations for BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1992.

A BE-12, Benchmark Survey of Foreign Direct Investment in the United States will be conducted covering 1992. All legal authorities, provisions, definitions, and requirements contained in §§ 806.1 through 806.13 and § 806.15(a) through (g) are applicable to this survey. Specific additional rules and regulations for the BE-12 survey are given below.

(a) *Response required.* A response is required from persons subject to the reporting requirements of the BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1992, contained herein, whether or not they are contacted by BEA. Also, a person, or their agent, contacted by BEA concerning their being subject to reporting, either by sending them a report form or by written inquiry, must respond in writing pursuant to § 806.4. This may be accomplished by

completing and returning either Form BE-12(X) within 30 days of its receipt if Form BE-12(LF), Form BE-12(SF), or Form BE-12 Bank do not apply, or by completing and returning Form BE-12(LF), Form BE-12(SF), or Form BE-12 Bank, whichever is applicable, by May 31, 1993.

(b) *Who must report.* A BE-12 report is required for each U.S. affiliate, i.e., for each U.S. business enterprise in which a foreign person owned or controlled, directly or indirectly, 10 percent or more of the voting securities if an incorporated U.S. business enterprise, or an equivalent interest if an unincorporated U.S. business enterprise, at the end of the business enterprise's 1992 fiscal year. A report is required even though the foreign person's ownership interest in the U.S. business enterprise may have been established or acquired during the reporting period. Beneficial, not record, ownership is the basis of the reporting criteria.

(c) *Forms to be filed.* (1) Form BE-12(LF)—Benchmark Survey of Foreign Direct Investment in the United States—1992 (Long Form) must be completed and filed by May 31, 1993, by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 1992 fiscal year, if:

(i) It is not a bank, and

(ii) On a fully consolidated, or, in the case of real estate investment, an aggregated basis, one or more of the following three items for the U.S. affiliate (not just the foreign parent's share) exceeded \$50 million (positive or negative) at the end of, or for, its 1992 fiscal year:

(A) Total assets (do not net out liabilities)

(B) Sales or gross operating revenues, excluding sales taxes, or

(C) Net income after provision for U.S. income taxes.

(2) Form BE-12(SF)—Benchmark Survey of Foreign Direct Investment in the United States—1992 (Short Form) must be completed and filed by May 31, 1993, by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 1992 fiscal year, if:

(i) It is not a bank, and

(ii) On a fully consolidated, or, in the case of real estate investments, an aggregated basis, one or more of the following three items for the U.S. affiliate (not just the foreign parent's share) exceeded \$1 million, but no one item exceeded \$50 million (positive or negative) at the end of, or for, its 1992 fiscal year:

(A) Total assets (do not net out liabilities)

(B) Sales or gross operating revenues, excluding sales taxes, or

(C) Net income after provision for U.S. income taxes.

(3) Form BE-12 Bank—Benchmark Survey of Foreign Direct Investment in the United States—1992 BANK must be completed and filed by May 31, 1993, by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 1992 fiscal year, if:

(i) The U.S. affiliate is a bank or a bank holding company, and

(ii) On a fully consolidated basis, one or more of the following three items for the U.S. affiliate (not just the foreign parent's share) exceeded \$1 million (positive or negative) at the end of, or for, its 1992 fiscal year:

(A) Total assets (do not net out liabilities)

(B) Sales or gross operating revenues, excluding sales taxes, or

(C) Net income after provision for U.S. income taxes.

(4) Form BE-12(X)—Benchmark Survey of Foreign Direct Investment in the United States—1992, Claim for Exemption from Filing BE-12(LF), BE-12(SF), and BE-12 Bank must be completed and filed within 30 days of the date it was received, or by May 31, 1993, whichever is sooner, by:

(i) Each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 1992 fiscal year (whether or not the U.S. affiliate, or its agent, is contacted by BEA concerning its being subject to reporting in the 1992 benchmark survey), but is exempt from filing Form BE-12(LF), Form BE-12(SF), and Form BE-12 Bank; and

(ii) Each U.S. business enterprise, or its agent, that is contacted, in writing, by BEA concerning its being subject to reporting in the 1992 benchmark survey but that is not otherwise required to file the Form BE-12(LF), Form BE-12(SF), or Form BE-12 Bank.

(d) *Aggregation of real estate investments.* All real estate investments of a foreign person must be aggregated for the purpose of applying the reporting criteria. A single report form must be filed to report the aggregate holdings, unless written permission has been received from BEA to do otherwise. Those holdings not aggregated must be reported separately.

(e) *Exemption.* (1) A U.S. affiliate as consolidated, or aggregated in the case of real estate investments, is not required to file a Form BE-12(LF), Form BE-12(SF), or Form BE-12 Bank if each of the following three items for the U.S. affiliate (not just the foreign parent's share) did not exceed \$1 million (positive or negative) at the end of, or for, its 1992 fiscal year:

(i) Total assets (do not net out liabilities)

(ii) Sales or gross operating revenues, excluding sales taxes, and

(iii) Net income after provision for U.S. income taxes.

(2) If a U.S. business enterprise was a U.S. affiliate at the end of its 1992 fiscal year but is exempt from filing a completed Form BE-12(LF), BE-12(SF), or Form BE-12 Bank, it must nevertheless file a completed and certified Form BE-12(X).

(f) *Due date.* A fully completed and certified Form BE-12(LF), Form BE-12(SF), or BE-12 Bank is due to be filed with BEA not later than May 31, 1993. A fully completed and certified Form BE-12(X) is due to be filed with BEA within 30 days of the date it was received, or by May 31, 1993, whichever is sooner.

[FR Doc. 92-30852 Filed 12-21-92; 8:45 am]
BILLING CODE 3510-EA-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

Other Assessable Penalties with Respect to the Preparation of Income Tax Returns for Other Persons

CFR Correction

In title 26 of the Code of Federal Regulations, part 1, section 1.1401 to end, revised as of April 1, 1992, on page 794 paragraph (f) was inadvertently removed from section 1.6695-1. As reinstated the text of paragraph (f) reads as follows:

§ 1.6695-1 Other assessable penalties with respect to the preparation of income tax returns for other persons.

* * * * *

(f) *Negotiation of check.* (1) No person who is an income tax return preparer may endorse or otherwise negotiate, directly or through an agent, a check for the refund of tax under subtitle A of the Internal Revenue Code of 1954 which is issued to a taxpayer other than the preparer if the person was a preparer of the return or claim for refund which gave rise to the refund check.

(2) Section 6695(f) and paragraph (f)(1) and (3) of this section do not apply to a preparer-bank which--

(i) Cashes a refund check and remits all of the cash to the taxpayer or accepts a refund check for deposit in full to a taxpayer's account, so long as the bank does not initially endorse or negotiate the check (unless the bank has made a

loan to the taxpayer on the basis of the anticipated refund); or

(ii) Endorses a refund check for deposit in full to a taxpayer's account pursuant to a written authorization of the taxpayer (unless the bank has made a loan to the taxpayer on the basis of the anticipated refund).

A preparer-bank may also subsequently endorse or negotiate a refund check as a part of the check-clearing process through the financial system after initial endorsement or negotiation.

(3) The preparer shall be subject to a penalty of \$500 for each endorsement or negotiation of a check prohibited under section 6695(f) and paragraph (f)(1) of this section.

BILLING CODE 1505-01-D

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AG02

Active Military Service Certified Under Section 401 of Public Law 95-202

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) has amended its regulations concerning persons who are included as having served on active duty. The need for this action results from recent decisions of the Secretary of the Air Force that the World War II service of members of U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division) Who Served Overseas as a Result of a Contract With the Air Transport Command; members of U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, Who Served Overseas as a Result of Pan American's Contract With the Air Transport Command and Naval Air Transport Service; and Honorably Discharged Members of the American Volunteer Guard, Eritrea Service Command constitutes active military service in the Armed Forces of the United States for purposes of all laws administered by VA. The effect of this action is to confer veteran status for VA benefit purposes on former members of these groups who were discharged under honorable conditions.

EFFECTIVE DATES: The effective date for § 3.7(x)(24) and (26) is June 29, 1992, the date on which the Secretary of the

Air Force determined that such service constitutes active duty. The effective date for § 3.7(x)(25) is July 16, 1992, the date on which the Secretary of the Air Force determined that such service constitutes active duty.

FOR FURTHER INFORMATION CONTACT: Lance Peterson, Consultant, Regulations Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue NW., Washington, DC 20420, telephone (202) 233-3005.

SUPPLEMENTARY INFORMATION: Section 401 of Public Law 95-202 authorized the Secretary of Defense to determine whether the service of members of civilian or contractual groups shall be considered active duty for the purposes of all laws administered by VA.

A notice of certification of the following group by the Secretary of the Air Force appeared in the *Federal Register* of August 6, 1992, 57 FR 34765: U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division) Who Served Overseas as a Result of a Contract With the Air Transport Command During the Period December 14, 1941, through August 14, 1945.

A notice of certification of the following group by the Secretary of the Air Force also appeared in the *Federal Register* of August 6, 1992, 57 FR 34765-66: U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, Who Served Overseas as a Result of Pan American's Contract With the Air Transport Command and Naval Air Transport Service During the Period December 14, 1941 through August 14, 1945.

A notice of certification of the following group by the Secretary of the Air Force also appeared in the *Federal Register* of August 6, 1992, 57 FR 34766: Honorably Discharged Members of the American Volunteer Guard, Eritrea Service Command During the Period June 21, 1942 to March 31, 1943.

VA is issuing a final rule to amend the provisions of 38 CFR 3.7(x). Because this change implements determinations of the Secretary of the Air Force in accordance with Pub. L. 95-202, which are binding on VA, publication as a proposal for public notice and comment is unnecessary.

Since a notice of proposed rulemaking is unnecessary and will not be published, this amendment is not a "rule" as defined in and made subject to the Regulatory Flexibility Act (RFA), 5 U.S.C., 601-612. This amendment will not directly affect any small entity.

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that this regulatory amendment is non-major for the following reasons:

(1) It will not have an annual effect on the economy of \$100 million or more.

(2) It will not cause a major increase in costs or prices.

(3) It will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

There is no affected Catalog of Federal Domestic Assistance program number.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: November 4, 1992.

Anthony J. Principi,

Acting Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a).

2. In § 3.7, paragraphs (x)(24), (25), and (26) are added to read as follows:

§ 3.7 Persons included.

* * * * *

(x) *Active military service certified as such under section 401 of Pub. L. 95-202.* * * *

* * * * *

(24) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division) Who Served Overseas as a Result of a Contract With the Air Transport Command During the Period December 14, 1941, through August 14, 1945.

(25) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, Who Served Overseas as a Result of Pan American's Contract With the Air Transport Command and Naval Air Transport Service During the Period December 14, 1941 through August 14, 1945.

(26) Honorably Discharged Members of the American Volunteer Guard,

Eritrea Service Command During the Period June 21, 1942 to March 31, 1943.

* * * * *
[FR Doc. 92-30830 Filed 12-21-92; 8:45 am]
BILLING CODE 8320-01-M

38 CFR Part 21

RIN 2900-AF91

Dependents' Education; Determining the Eligibility Period

AGENCY: Department of Veterans Affairs.
ACTION: Final regulations.

SUMMARY: Eligible surviving spouses have a ten-year period during which they must use their Dependents' Educational Assistance. After a review of the Department of Veterans Affairs' (VA's) administrative experience and a careful reading of the governing statute, VA is revising the criteria for determining the beginning of surviving spouses' eligibility periods.

EFFECTIVE DATE: December 22, 1992.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer (225), Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-2092.

SUPPLEMENTARY INFORMATION: On pages 33473 and 33474 of the Federal Register of July 29, 1992, there was published a Notice of Intent to amend 38 CFR part 21 in order to change the criteria for determining the beginning of surviving spouses' eligibility periods for Dependents' Educational Assistance. Interested people were given 30 days to submit comments, suggestions or objections. VA received no comments, suggestions or objections. Accordingly, VA is making the proposal final.

The Department of Veterans Affairs has determined that this amended regulation does not contain a major rule as that term is defined by E.O. 12291, entitled Federal Regulation. The regulation will not have a \$100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. It will have no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Secretary of Veterans Affairs has certified that this amended regulation will not have a significant economic impact on a substantial number of small

entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the amended regulation, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

This certification can be made because the amended regulation directly affects only individuals. It will have no significant economic impact on small entities, i.e., small business, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance number for the program affected by this proposal is 64.117.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: November 5, 1992.

Anthony J. Principi,
Acting Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 21, subpart C is amended as set forth below.

PART 21-VOCATIONAL REHABILITATION AND EDUCATION

Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

1. The authority citation for part 21, subpart C is revised to read as follows:

Authority: 38 U.S.C. 501(a), 3500-3566.

2. In § 21.3046 paragraph (b)(5) is revised and its authority citation is added to read as follows.

§ 21.3046 Periods of eligibility; spouses and surviving spouses.

* * * * *
(b) *Beginning date of eligibility period—surviving spouses.* * * *

(5) If the veteran's death occurred after November 30, 1968, and VA makes a final decision concerning the surviving spouse's eligibility for dependents educational assistance after October 27, 1986, VA will determine the beginning date of the 10-year period as follows.

(i) If the surviving spouse's eligibility is based on the veteran's death while a total, service-connected disability evaluated as permanent in nature was in existence, the beginning date of the 10-year period is the date of death.

(ii) If the surviving spouse's eligibility is based on the veteran's death from a

service-connected disability, the surviving spouse will choose the beginning date of the 10-year period. That date will be no earlier than the date of death and no later than the date of the VA determination that the veteran's death was due to a service-connected disability.

(Authority: 38 U.S.C. 3512(b); Pub. L. 99-576)

* * * * *
[FR Doc. 92-30829 Filed 12-21-92; 8:45 am]
BILLING CODE 8320-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 61

[CC Docket No. 92-13; FCC 92-494; FCC 92-524]

Tariff Filing Requirements for Interstate Common Carriers

AGENCY: Federal Communications Commission (FCC).

ACTION: Final rule; delay of effective date.

SUMMARY: The Commission is amending its rules to provide that a domestic carrier classified as nondominant that is subject to forbearance is not required to file tariffs. The Report and Order in this proceeding reaffirms the Commission's prior conclusions that its permissive detariffing rules are lawful and serve the public interest. However, the Report and Order is stayed until further notice as a result of the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *AT&T v. FCC*, No. 92-1053 (D.C. Cir Nov. 13, 1992) (*AT&T v. FCC*).
EFFECTIVE DATE: The effective date of the Report and Order is stayed until further notice.

FOR FURTHER INFORMATION CONTACT: Donna N. Lampert, (202) 632-6365, or John S. Morabito, (202) 632-1290, Policy and Program Planning Division, Common Carrier Bureau.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The proposals have been analyzed with respect to the Paperwork Reduction Act of 1980, as amended, 44 U.S.C. 3501-20, and found to impose no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements; and will not increase burden hours imposed on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by that Act.

Background

Common Carrier Docket 92-13: Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, 7 FCC Rcd 804 (1992) (57 FR 6487 (2/25/92)).

Summary

1. This is a summary of a Report and Order in Common Carrier Docket 92-13, Tariff Filing Requirements for Interstate Common Carriers, adopted November 5, 1992 and released November 25, 1992 (FCC 92-494), and a summary of an Order staying the effectiveness of the Report and Order, Tariff Filing Requirements for Interstate Common Carriers, adopted November 25, 1992 and released November 25, 1992 (FCC 92-524). The full texts of the Commission's decisions are available for inspection and copying, Monday through Friday, 9 a.m.-4:30 p.m., in the FCC Reference Room (room 239), 1919 M Street, N.W., Washington, DC 20554. The complete text of the Report and Order may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1114 21st Street, NW., Washington, DC 20036.

2. The Commission initiated this rulemaking proceeding in response to a complaint filed by AT&T challenging, in effect, the lawfulness and future application of the tariff forbearance rules adopted nearly a decade ago in the Competitive Carrier proceeding. In the Competitive Carrier proceeding, the Commission concluded that because nondominant domestic carriers lacked market power, they would be unable to charge unjust and unreasonable rates in violation of section 201(b) of the Communications Act, or to discriminate unreasonably in violation of section 202(a) of the Communications Act. Under these circumstances, the Commission determined that traditional tariff regulation of nondominant carriers was not necessary and thus that it should no longer require nondominant carriers to file tariffs. After soliciting and reviewing comments on this matter, the Commission concludes that its policy of not requiring domestic nondominant carriers to file tariffs is both lawful and in the public interest.

3. Section 203(a) of the Communications Act generally requires every common carrier, except connecting carriers, to file tariffs with the Commission. Section 203(b)(2) of the Communications Act, however, authorizes the Commission to modify any requirement of that section except the notice period. Because Congress intended for the FCC to have broad

powers in its implementation of the Communications Act and the statutory language does not specifically limit the FCC's authority in this respect, the Commission finds that it may lawfully allow carriers to engage in permissive detariffing so long as doing so serves the public interest. The Commission also notes that Congress is aware of, and several times has referred to, the FCC's forbearance rules, without repealing, altering or expressing any reservations about them.

4. In addition, the Report and Order determines that permissive detariffing has served its intended purpose in promoting the goals of the Communications Act. Under forbearance, the FCC remains committed to enforcing the requirements of the Communications Act that carriers' rates and practices be just, reasonable and not unreasonably discriminatory. The Commission reaffirmed that because nondominant carriers do not have market power, competitive market forces will serve to ensure compliance with these substantive requirements. Moreover, the section 208 complaint process remains available to enforce sections 201(b) and 202(a) of the Communications Act.

5. The Report and Order explains that without forbearance the goals of the Communications Act would be frustrated due to the burdens imposed upon nondominant carriers. It states that permissive detariffing has stimulated competition and given consumers more flexibility with respect to the price and type of services available and greater choice regarding the selection of carriers.

6. On November 13, 1992, the U.S. Court of Appeals for the District of Columbia Circuit vacated our permissive detariffing rules as applied in the Fourth Report and Order in the Competitive Carrier proceeding, 95 FCC 2d 554 (1983); *AT&T v. FCC*. In light of the court's decision, the Commission has determined that it will stay the Report and Order, pending any further litigation of the matters decided in *AT&T v. FCC*.

Final Regulatory Flexibility Analysis Statement

7. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-12, the Commission's final analysis with respect to the Report and Order is as follows:

Need and purpose of this action

This rulemaking proceeding was initiated to review the continuing lawfulness of the Commission's existing permissive detariffing rules in light of a

complaint filed by AT&T alleging, in effect, that these rules violate the Communications Act. This Report and Order sustains those rules as being consistent with the Communications Act and the public interest.

Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Act Analysis

The Initial Regulatory Flexibility Analysis stated that any change in existing rules could have a significant impact on a broad range of telecommunications common carriers. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected

The Notice of Proposed Rulemaking did not propose new rules or alternative policies, but sought comment on the lawfulness of our existing permissive detariffing rules and on how they should be changed in the event they are found unlawful. This item reaffirms and codifies our existing rules that minimize regulatory burdens on nondominant carriers.

8. Copies of the final regulatory flexibility analysis are available for inspection and copying, Monday through Friday, 9 a.m.-4:30 p.m., in the FCC Dockets Reference Room (room 239), 1919 M Street, NW., Washington, DC 20554. The final regulatory flexibility analysis may also be purchased, as part of the Report and Order, from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1114 21st Street, NW., Washington, DC 20036. See 5 U.S.C. 604(b).

Ordering Clause

9. *It is ordered* that, pursuant to the authority contained in sections 1, 4, and 201-05 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154 and 201-05, the Report and Order is adopted amending part 61 of the Commission's Rules, 47 CFR part 61.

10. *It is further ordered* that, the Report and Order in this proceeding, FCC 92-494, adopted November 5, 1992, is stayed until further notice.

List of Subjects in 47 CFR Part 61

Communications common carriers, Radio, Reporting and recordkeeping requirements, Telegraph, and Telephone.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Final Rule Changes

Part 61 of title 47 of the Code of Federal Regulations is amended as follows:

PART 61—TARIFFS

1. The authority citation for part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.50 is added to read as follows:

§ 61.50 Carriers subject to forbearance.

Notwithstanding the rules set forth herein, no domestic carrier classified as nondominant that is subject to forbearance is required to file tariffs.

[FR Doc. 92-30926 Filed 12-21-92; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 92-199; RM-8050]

Radio Broadcasting Services; Smiths, AL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots FM Channel 267A to Smiths, Alabama, as that community's first local aural transmission service, in response to a petition for rule making filed on behalf of Smiths Communications. See 57 FR 42536, September 15, 1992. Coordinates used for Channel 267A at Smiths are 32-28-42 and 85-08-06, with a site restriction 7.4-kilometers (4.6 miles) southwest of the community. With this action, the proceeding is terminated.

EFFECTIVE DATE: January 28, 1993. The window period for filing applications on Channel 267A at Smiths, Alabama, will open on January 29, 1993, and close on March 1, 1993.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92-199, adopted November 24, 1992, and released December 14, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The

complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1990 M Street, NW., suite 640, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by adding Channel 267A, Smiths.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 92-30931 Filed 12-21-92; 8:45 am]

BILLING CODE 6712-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1804

Changes to Contractor Performance Summary Guidance

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the NASA Federal Acquisition Regulation Supplement (NFS), chapter 18 of the Federal Acquisition Regulation System in title 48 of the Code of Federal Regulations. This rule sets forth NASA's policy on Contractor Performance Summaries and revises the rating system on NASA Form 1651, Contractor Performance Summary (CPS).

DATES: Comments must be received on or before February 22, 1993.

ADDRESSES: Submit comments to the Assistant Administrator for Procurement, NASA, Code HP, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Deback, Code HP, Telephone: (202) 358-0431.

SUPPLEMENTARY INFORMATION:

Background

The Contractor Performance Summary System was initiated by Procurement Notice (PN) 89-27, dated January 28, 1992, and subsequently incorporated

into the NASA FAR Supplement. The changes to the system initiated by this rule result from center comments following the preparation of the initial series of reports and a change to the Award Fee adjectival rating system.

Impact

The Director, Office of Management and Budget (OMB) by memorandum, dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. This regulation falls in this category. NASA certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. *et seq.*) because most of the changes impact internal procedures. This rule does not impose any reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 48 CFR Part 1804

Government procurement.

Don G. Bush,

Assistant Administrator for Procurement.

PART 1804—ADMINISTRATIVE MATTERS

1. The authority citation for 48 CFR, part 1804 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

1804.677-1 [Amended]

2. In section 1804.677-1, paragraph (c) is revised to read as follows:

1804.677-1 Applicability and coverage.

* * * * *

(c) The CPS will be completed once annually for award fee contracts in excess of \$25M (total contract value including options) and for award fee contracts awarded after January 1, 1992, regardless of dollar value, for which at least one award fee evaluation has been completed during the year prior to January 1 of the year in which the report is due. CPS's may also be submitted for significant non-award fee contracts at the center's discretion.

3. In section 1804.677-4, paragraph (b) is revised to read as follows:

1804.677-4 Distribution of CPS's and interagency requests.

* * * * *

(b) The Assistant Administrator for Procurement (Code HK) is the agency focal point for processing CPS requests from Government activities outside the agency. All such requests are to be forwarded to Code HK for action.

4. In section 1804.677-6, paragraphs (n)(2), (n)(4), and (q) are revised to read as follows:

1804.677-6 Instructions for completing
NASA Form 1651, Contractor Performance
Summary Report—CPS.

* * * * *

(n) * * *

(2) Each applicable evaluation area will be evaluated as Excellent, Very Good, Good, Satisfactory, or Poor/Unsatisfactory. The following definitions are provided as guidance in determining the appropriate rating:

Excellent: Of exceptional merit; exemplary performance in a timely, efficient, and economical manner; very minor (if any) deficiencies with no adverse effect on overall performance (Point Range: 91-100).

Very Good: Very effective performance, fully responsive to contract requirements accomplished in a timely, efficient, and economical manner for the most part. Only minor deficiencies (Point Range: 81-90).

Good: Effective performance; fully responsive to contract requirements; reportable deficiencies, but with little identifiable effect on overall performance (Point Range: 71-80).

Satisfactory: Meets or slightly exceeds minimum acceptable standards; adequate results. Reportable deficiencies with identifiable, but not substantial, effects on overall performance (Point Range: 61-70).

Poor/Unsatisfactory: Does not meet minimum acceptable standards in one or more areas; remedial action required in one or more areas; deficiencies in one or more areas which adversely affect overall performance (Point Range: 0-60).

"N/A" will be indicated for any area clearly not evaluated by the PEB.

* * * * *

(4) If any area is rated "Satisfactory" or below, the contracting officer will provide a brief explanation of each such rating in Item 16.

* * * * *

(q) Item 16, Contracting Officer Comments. The contracting officer will briefly discuss the causes and rationale for any ratings of "Satisfactory" or below.

* * * * *

[FR Doc. 92-30799 Filed 12-21-92; 8:45 am]

BILLING CODE 7510-01-M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs
Administration

49 CFR Part 171

[Docket No. HM-215; Amdt. No. 171-117]

International Maritime Dangerous
Goods Code and ICAO Technical
Instructions; Matter Incorporated by
Reference

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule updates a reference in the Hazardous Materials Regulations to the International Maritime Dangerous Goods Code (IMDG Code) to include the most recent amendment to the Code. This rule also implements the most recent edition of the International Civil Aviation Organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions). These amendments are necessary to facilitate the continued transport of hazardous materials in international commerce by vessel and aircraft when these two international regulations become effective.

DATES: January 1, 1993.

The incorporation by reference of certain publications listed in this final rule is approved by the Director of the Office of the Federal Register as of January 1, 1993.

ADDRESSES: Address comments to the Dockets Unit (DHM-30), Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001.

Comments should identify the docket and be submitted in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped post card. The Dockets Unit is located in room 8421 of the Nassif Building, 400 Seventh Street, SW., Washington, DC. Public dockets may be reviewed between the hours of 8:30 a.m. and 5 p.m. Monday through Friday, except for legal Federal holidays.

FOR FURTHER INFORMATION CONTACT: Beth Romo, telephone (202) 366-4488, Office of Hazardous Materials Standards, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION: The Research and Special Programs Administration (RSPA) is revising the regulations in 49 CFR 171.7 to recognize Amendment 26 to the IMDG Code, which has recently been published by the International Maritime Organization (IMO). This amendment promulgates numerous miscellaneous changes to the IMDG Code and addresses such matters as classification, labeling, packaging, and documentation. IMO has established January 1, 1993, as the implementation date for these amendments. In § 171.12, the Hazardous Materials Regulations (HMR) authorize shipments prepared in accordance with the IMDG Code if all or part of the transportation is by vessel, subject to certain conditions and limitations.

This rule also incorporates by reference the 1993-1994 edition of the ICAO Technical Instructions, which becomes effective on January 1, 1993, pursuant to decisions taken by the ICAO Council regarding implementation of Annex 18 to the Convention on International Civil Aviation. The offering, acceptance and transportation of hazardous materials by aircraft, and by motor vehicle either before or after being transported by aircraft, is authorized in § 171.11 as fully equivalent to the HMR (with certain exceptions) if in conformance with the ICAO Technical Instructions. RSPA is considering certain other amendments to part 175 to improve consistency between 49 CFR and the ICAO Technical Instructions under a separate rulemaking action, Docket HM-184.

This rule is intended to facilitate the international transportation of hazardous materials by aircraft and vessel by ensuring a basic consistency between the HMR and the international regulations. Because this rule provides for the continued use of international standards without adversely affecting safety or imposing additional requirements on persons subject to the HMR, notice and public procedure are considered unnecessary. For these same reasons, these amendments are being made effective without the customary 30-day delay following publication. This will allow use of these two international regulations when they become effective on January 1, 1993. Because this final rule is published without prior notice, RSPA is requesting comments by February 15, 1993. If warranted, a future notice will be published in the *Federal Register* addressing substantive comments.

Rulemaking Analyses and Notices**A. Executive Order 12291**

This interim final rule does not meet the criteria specified in section 1(b) of Executive Order 12291 and is, therefore, not a major rule and is not a significant rule under the regulatory procedures of the Department of Transportation (44 U.S.C. 11034). This interim final rule does not require a Regulatory Impact Analysis, or an environmental assessment or impact statement under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). It also imposes no additional requirements on any person; therefore, a regulatory evaluation was not prepared.

B. Executive Order 12612

This interim final rule has been analyzed in accordance with Executive Order 12612. This final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

The Hazardous Materials Transportation Act contains an express preemption provision (49 App. U.S.C. 1804(a)(4)) that preempts State and local requirements on certain covered subjects (including the designation, description, and classification of

hazardous materials) unless the State or local requirement is substantively the same in the Federal requirement on that subject. Thus, RSPA lacks discretion in this area.

C. Impact on Small Entities

Based on limited information concerning size and nature of entities likely to be affected by this rule, I certify this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR part 171 is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 App. U.S.C. 1802, 1803, 1804, 1805, 1808, 1815, 1818; 49 CFR part 1.

§ 171.7 [Amended]

2. In § 171.7, in the table in paragraph (a)(3), the following changes are made:

a. The entry "International Maritime Dangerous Goods (IMDG) Code, 1990 Consolidated Edition" is amended by adding the wording ", as amended by Amendment 26 thereto" immediately after the word "Edition".

b. For the entry "Technical Instructions for the Safe Transport of Dangerous Goods" under ICAO, the date "1991-1992" is revised to read "1993-1994".

Issued in Washington, DC on December 15, 1992 under authority delegated in 49 CFR part 1.

Douglas B. Ham,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 92-30861 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-60-M

Proposed Rules

Federal Register

Vol. 57, No. 246

Tuesday, December 22, 1992

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

8 CFR Part 3

[AG Order No. 1639-92]

Executive Office for Immigration Review; Criminal Conviction Records

AGENCY: Department of Justice.

ACTION: Proposed rule with request for comments.

SUMMARY: The proposed rule outlines the types of documentary evidence and records which will be admissible in proceedings before an Immigration Judge to prove a criminal conviction. It expands the class of documents and records which will be accepted by an Immigration Judge, and includes the use of abstracts of convictions and records which are electronically transferred by individual states to the Immigration and Naturalization Services (INS). These proposed changes are necessary to implement section 507 of the Immigration Act of 1990 (IMMACT).

DATES: Written comments must be submitted on or before January 21, 1993.

ADDRESSES: Please submit written comments to Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041.

FOR FURTHER INFORMATION CONTACT: Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION: Section 507 of IMMACT amended the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3753(a)(11)) by requiring individual states which receive grants under the Omnibus Act to provide, without fee to the INS, certified records of conviction of aliens who have been convicted of violating the criminal laws of the state. The records provided to the INS to prove a criminal conviction may vary from state to state; therefore, the proposed rule sets forth

provisions which will recognize and allow different types of conviction records to be admitted in immigration proceedings.

The proposed rule will expand the types of documents and records admissible to prove a criminal conviction. Those documents and records which are most frequently provided to the INS by the states to prove a criminal conviction will continue to be accepted, *i.e.*, a record of judgment and conviction, and a plea, verdict and sentence record. Additionally, docket entry records, court transcripts and minutes of court proceedings will be admissible if the document or record evidences a criminal conviction. The list of admissible documents and records specified in the proposed rule will not be exclusive; it will merely identify those most commonly available to the INS at present.

Additionally, the states may electronically transfer records of convictions and abstracts of records to the INS from the state record repositories. However, before these electronic records may be used, they must be certified as official records by a state official associated with the state's repository of criminal justice records. Further, the INS official who receives the record must certify in writing that such record has been received electronically from the state's record repository. These procedures will assure the accuracy and reliability of the records admitted into the proceedings by the Immigration Judge. The proposed rule anticipates that other evidence may be used to demonstrate a criminal conviction, if in the discretion of the Immigration Judge, it is deemed probative and relevant.

The proposed rule provides that a document or record which is offered into evidence must be a certified copy of an official document or record, or a photocopy certified by an immigration official to be a true and correct copy of the original record. This provision will allow the INS to offer photocopies of records into evidence when it is too costly or burdensome to obtain certified records.

In addition to the safeguards built into this proposed rule concerning the accuracy of documents and records, the hearing process offers additional safeguards. An individual will have an

opportunity to challenge the accuracy of any document or record presented. The proposed rule speaks to admissibility only; it does not state that the document or record is dispositive of the existence of a criminal conviction. Furthermore, when the record of a criminal conviction is not dispositive of the deportation or exclusion ground or of the underlying issue, the Immigration Judge may require the submission of additional evidence.

In accordance with 5 U.S.C. 605(b); the Attorney General certifies that this proposed rule does not have a significant adverse economic impact on a substantial number of small entities. This proposed rule is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this proposed rule have Federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612. The proposed rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of E.O. 12778.

List of Subjects in 8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

Accordingly, title 8, chapter I of the code of Federal Regulations is proposed to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1362; 28 U.S.C. 509, 510, 1746; Sec. 2 Reorg. Plan No. 2 of 1950, 3 CFR 1949-1953 Comp., p. 1002.

2. Section 3.41 is added to part 3 as follows:

§ 3.41 Record of conviction.

In any proceeding before an Immigration Judge,

(a) Any of the following documents or records shall be admissible as evidence in providing a criminal conviction:

- (1) A record of judgment and conviction;
- (2) A record of plea, verdict and sentence;
- (3) A docket entry from court records that indicates the existence of a conviction;
- (4) Minutes of a court proceeding or a transcript of a hearing that indicate the existence of a conviction;

(5) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state law enforcement official associated with the state's repository of criminal justice records, that indicates the following: the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence;

(6) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(b) Any document or record of the types specified in paragraph (a) of this section may be submitted if it complies with the requirements of § 287.6(a) of this chapter, or a copy of any such document or record may be submitted if it is attested in writing by an immigration officer to be a true and correct copy of the original.

(c) Any record of conviction or abstract that has been submitted by electronic means to the INS from a state shall be admissible as evidence to prove a criminal conviction if it:

(1) Is certified by a state law enforcement official associated with the state's repository of criminal justice records as an official record from its repository; and,

(2) Is certified in writing by an INS official as having been received electronically from the state's record repository.

(d) Any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

Dated: December 14, 1992.

William P. Barr,
Attorney General.

[FR Doc. 92-30952 Filed 12-21-92; 8:45 am]

BILLING CODE 1531-26-GF

Immigration and Naturalization Service

8 CFR Part 235

[INS No. 1512-92]

RIN 1115-AD17

Inspection of Persons Applying for Admission

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule provides for the reimbursement to the Immigration and Naturalization Service (Service) for certain direct salary costs and administrative overhead charges in its overtime billing for arriving trains and

vessels under 8 U.S.C. 1353b, for all immigration inspection services rendered to crews, and for those services rendered to passengers that are not exempt under 8 U.S.C. 1353b or 8 U.S.C. 1356(g). This change is proposed in order to comply with the provisions of 31 U.S.C. 9701, the User Charges Statute, which requires that the cost, both direct and indirect, of providing special services be recovered from the benefitting parties. This rule will help ensure that the Service can provide sufficient administrative support to its overtime billing function.

DATES: Written comments must be submitted on or before January 21, 1993.

ADDRESSES: Please submit comments in triplicate to the Records Systems Division, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., room 2001D, Washington, DC 20536. To ensure proper and timely handling please reference the INS No. 1512-92 on your correspondence.

FOR FURTHER INFORMATION CONTACT: Jeff Cohen, Systems Accountant, Financial Policy and Special Projects Section, Immigration and Naturalization Service, 425 I Street, NW., room 6321, Washington, DC 20536, telephone (202) 376-2804.

SUPPLEMENTARY INFORMATION: On October 30, 1986, Congress passed section 205 of the Department of Justice Appropriation Act, 1987 (codified at 8 U.S.C. 1356 (d) through (p)), which provides for the collection of a user fee from arriving air and sea passengers. On July 3, 1991, the Immigration and Naturalization Service published a notice at 56 FR 30597 announcing the resumption of overtime billing on September 3, 1991, for arriving aircraft, trains, and vessels under 8 U.S.C. 1353b.

This proposed rule clarifies those costs that are billable by including direct Medicare and Social Security (FICA) costs of inspection overtime of 6 percent and an administrative overhead charge of 15 percent.

In Comptroller General Decision B-114898 dated November 13, 1975, (55 Comp. Gen. 456), the propriety of charging for administrative overhead costs on inspectional extra compensation bills was addressed and affirmed. This decision states that in the absence of a provision in an agency's accounting system for determining administrative overhead, a charge of 15 percent of the identified costs of providing the service should be included in its charges for reimbursable services. Paragraph (e)(1) of 49 app. U.S.C. 1741 precludes adding an

administrative overhead charge for inspections of arriving aircraft.

With regard to employees hired before January 1, 1984, the Service pays 1.45 percent of their gross income up to \$130,200 for the Medicare portion of the social security tax. With regard to employees hired after December 31, 1983, the Service pays 6.2 percent of their gross income up to \$55,500 for FICA, and 1.45 percent for Medicare on gross income up to \$130,200. Based on our analysis, six percent represents an average rate that will recoup the expenses for social security tax on billable inspectional extra compensation assignments.

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

List of Subjects in 8 CFR Part 235

Administrative practice and procedure, Inspections, Ports of entry, Transportation.

Accordingly, part 235 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

1. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1183, 1201, 1224, 1225, 1226, 1227, 1228, 1252, 1353a and 1353b; 31 U.S.C. 9701.

2. A new § 235.13 is added to read as follows:

§ 235.13 Billing for inspection services.

(a) *Reimbursement for Inspection Services.* (1) Owners, operators, and agents of vessels and railroad trains arriving from foreign ports, except when they are operating on regular schedules at designated ports of entry, will be liable for extra compensation paid under 8 U.S.C. 1353b to immigration officers when inspections of the passengers and crews of those conveyances are performed on Sundays and holidays, or between 5 p.m. and 8 a.m. on days other than Sundays and holidays.

(2) Owners operators, and agents of aircraft operating on a schedule which was not approved by the Immigration and Naturalization Service thirty (30)

days prior to arrival will be liable for extra compensation paid, under 8 U.S.C. 1353b, to immigration officers when inspections of the passengers and crews are performed between the hours of 5 p.m. and 8 a.m. The Service shall provide required immigration services, at no expense to airlines or its passengers (except those fees imposed by 8 CFR part 286), to those passengers arriving on scheduled U.S. flights at immigration serviced airports and other ports of entry.

(b) *Recovery of administrative overhead and Social Security Tax on reimbursable inspection services.* In computing extra compensation bills, a rate of 25 percent will be applied to the extra compensation paid to immigration officers performing inspections for arriving trains and vessels to recover the cost of administrative overhead associated with the inspection services. An additional six percent will be applied to the extra compensation to recover the Service's contribution for social security tax for arriving aircraft, trains, and vessels.

Dated: November 17, 1992.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 92-30964 Filed 12-21-92; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 9

[Docket No. 92-26]

Fiduciary Powers of National Banks and Collective Investment Funds

AGENCY: Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency ("OCC") is proposing to amend its regulations governing the exercise of fiduciary powers by national banks. The intent of this amendment is to clarify the requirement at 12 CFR 9.18(b)(6), consistent with the long established interpretation of the OCC, that all in-kind distributions of collective investment fund assets must be made on a ratable basis. This action is necessary in light of a recent Federal district court decision that has called into question the clarity of this current requirement.

DATES: Written comments must be submitted on or before February 22, 1993.

ADDRESSES: Comments should be directed to: Communications Division, 9th Floor, 250 E Street SW., Washington, DC 20219; Attention: Karen Carter; Docket No. 92-26. Comments will be available for public inspection and photocopying at the same location.

FOR FURTHER INFORMATION CONTACT: Dean E. Miller, Senior Adviser, Fiduciary Activities, (202) 874-4810; Donald W. Lamson, Assistant Director, Securities, Investments, and Fiduciary Practices Division, (202) 874-5210; Office of the Comptroller of the Currency.

SUPPLEMENTARY INFORMATION: The OCC is proposing to amend 12 CFR 9.18,¹ which governs the administration of collective investment funds² by national banks.³

Background

Collective investment funds held by national banks as trustee or otherwise consist of assets of retirement, pension, profit-sharing, stock bonus or other trusts exempt from taxation under the IRC. A trustee acting pursuant to a declaration of trust invests collective investment fund assets for the benefit of participants in liquid and illiquid assets. Illiquid assets can include real estate and other assets that are not readily marketable. Participants in collective investment funds own a pro rata interest in each asset held by the fund, thus gaining the benefit of investment diversification. Twelve CFR 9.18(b)(3) provides that the interests of all participants " * * * shall be on the basis of a proportionate interest in all the assets."

¹ The OCC previously issued a separate notice of proposed rulemaking concerning the fiduciary activities of national banks and collective investment funds. Docket No. 90-3, 55 FR 4184 (February 7, 1990) (covering several provisions of 12 CFR 9.18). Although the comment period for Docket No. 90-3 has closed, the OCC has not yet taken action concerning that proposal. This rulemaking proposal is unrelated to and does not purport to affect Docket No. 90-3.

² The term "collective investment fund" is used throughout this preamble to denote both common trust funds for private trusts and collective trusts for pension, profit-sharing, and other tax-exempt accounts. The latter collective trusts, also referred to as "employee benefit funds", are established under the authority of 12 CFR 9.18(a)(2). Accounts eligible for commingling in employee benefit funds may, if held in trust, alternatively be commingled with private trusts in a common trust fund. See 12 CFR 9.18(p)(2).

³ This proposal would also affect collective investment activities undertaken by federally-chartered savings and loan associations, under existing regulations of the Office of Thrift Supervision ("OTS"). Similarly, the proposal would affect state-chartered banks, since common trusts funds of state-chartered banks qualifying for tax-exempt status are required by section 584 of the International Revenue Code of 1986, as amended ("IRC"), to comport with 12 CFR 9.18.

Distributions from collective investment funds are governed in part by 12 CFR 9.18(b)(6). That section allows fund distributions to be made " * * * in cash or ratably in kind, or partly in cash and partly in kind." The OCC has interpreted this provision to require that all types of distributions must be made ratably, whether all in kind or partly in kind, to give effect to the requirement that participants' pro rata interests in the trust corpus shall reflect a proportionate interest in all the fund assets.

Current § 9.18(b)(6) was adopted in 1963. Previously, the regulation allowed distributions to be made " * * * in cash or ratably in kind, or partly in cash and partly ratably in kind." The word "ratably" in the second clause was redundant. In 1963 the OCC deleted this word. 28 FR 3309 (Apr. 5, 1963). The word "partly" in the second clause could be mistakenly read to modify the word "ratably." The second clause then could be misinterpreted to mean that some portion of an in-kind distribution must be made ratably and some portion of the in-kind distribution need not be made ratably. Although the OCC changed the language of § 9.18(b)(6) in this manner, its interpretation of the ratable requirement for total and partial in-kind distributions has remained constant throughout this period.

A recent decision of the United States District Court for the Northern District of Illinois has called into question the clarity of § 9.18(b)(6). In *First National Bank of Chicago v. Robert L. Clarke and the Office of the Comptroller of the Currency*, Civil Action No. 90-C-5963, the district court held that § 9.18(b)(6) did not require the in-kind portion of combined cash and in-kind distributions to be made on a ratable basis. As a result, participants in collective investment funds holding real estate or other illiquid assets could receive in-kind distributions of whole real estate parcels and other illiquid assets scattered throughout the country, rather than distributions of cash and other instruments reflecting their proportionate interests in the entire asset base of the fund.

This decision was overturned by the U.S. Court of Appeals for the Seventh Circuit. *First National Bank of Chicago v. Robert L. Clarke and the Office of the Comptroller of the Currency*, 956 F.2d 1360 (7th Cir. 1992) In turn, the U.S. Supreme Court has declined to review this case on appeal by denying certiorari. _____ U.S. _____ (October 5, 1992). Although the Comptroller's longstanding interpretation of this regulation was upheld, this litigation

has demonstrated that it is appropriate to clarify the provision to prevent further confusion.

Should the district court's decision be adopted in subsequent litigation, situations could arise where trustees could evade the ratability requirement of § 9.18(b)(6) by combining a minimal amount of cash with in-kind distributions of fund assets. The OCC believes that a distribution of unmarketable stock or real estate to a participant conflicts with the § 9.18(b)(3) requirement that participants share on a proportionate basis in the assets of a fund. Nonratable in-kind distributions made in reliance on the court's reading of § 9.18(b)(6) may create hardships on participants who are not prepared to manage or sell real estate or other distributed assets. Non-ratable in-kind distributions would defeat the goal of diversification that participation in a collective investment fund is intended to achieve.

Distributions to participants of illiquid or unmarketable assets, such as parcels of real estate, which by their very nature are unique, can lead to instances where participants' distributions could appreciate or depreciate at markedly different rates. In such cases, some participants who believe they are harmed by the type and manner of distributions might sue the trustee. Clarification of the requirement in § 9.18(b)(6) that all in-kind distributions must be made ratably would help insure that all fund participants share proportionately in fund assets.

Proposal

The OCC is proposing to revise § 9.18(b)(6) to clarify that all in-kind distributions of fund assets, including those that are combined with cash distributions, must be made on a ratable basis. This proposal is consistent with the OCC's long-held interpretation that distributions of fund assets limited solely to in-kind assets, rather than cash, be made on a ratable basis.⁴

The OCC is aware that the ratability requirement can result in a property

⁴ The OCC for nearly thirty years has interpreted the current language of § 9.18(b)(6) governing combined in-kind and cash distributions in this manner. For example the OCC stated in letter (unpublished) of April 1, 1986:

Units of participation in a collective investment fund are based upon a proportionate interest in all the assets of the Fund . . . If there is insufficient cash and liquid assets to satisfy all withdrawals, the available cash and/or assets should be distributed to withdrawing accounts based upon their proportionate interest in such cash and/or assets.

Therefore, any distributions made as of March 31 should be made on a pro rata basis in accordance with 12 CFR 9.18.

being distributed to and held by multiple owners. The OCC also is aware that multiple ownership of real property or other illiquid assets can adversely affect a property's marketability. The OCC believes, however, that this effect is outweighed by the requirement that all participants must share proportionately in fund assets. Moreover, the potentially adverse effect of multiple ownership is one with which trustees have been confronted for nearly thirty years. Thus, this proposal does not increase the burden that trustees face when required to dispose of assets with limited marketability.

The OCC believes that this proposal is necessary to prevent a trustee from making an in-kind distribution rather than devoting the effort necessary to manage properly the properties and other illiquid assets with which it has been entrusted for the benefit of fund participants. As a matter of prudence, trustees traditionally have disposed of assets with limited marketability rather than make in-kind distributions. This proposal merely requires trustees to continue observing this practice.

Comment

In connection with this proposal, the OCC requests comments from any interested party.

Executive Order 12291

It has been determined that this document is not a major regulation as defined in E.O. 12291 and a regulatory impact analysis is not required. This proposal clarifies an OCC regulation and merely requires trustees to continue observing a long-established practice.

Regulatory Flexibility Act

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. No. 96-354-94 Stat. 1164, 5 U.S.C. 601-612), it is certified that the proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. The effect of this proposal is minimal. This proposal clarifies an OCC regulation and merely requires trustees, regardless of size, to continue observing a long-established practice.

Lists of Subjects in 12 CFR Part 9

Collective investment funds, Estates, Fiduciary powers, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

Authority and Issuance

For the reasons set out in the preamble, part 9 of chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 9—FIDUCIARY POWERS OF NATIONAL BANKS AND COLLECTIVE INVESTMENT FUNDS

1. The authority citation for 12 CFR part 9 is revised to read as follows:

Authority: 12 U.S.C. 92a, 93a, and 481.

2. Section 9.18 is amended by revising paragraph (b)(6) to read as follows:

§ 9.18 Collective investment.

* * * * *
(b) * * *

(6) When participations are withdrawn from a collective investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind on a ratable basis: *Provided*, That all distributions as of any one valuation date shall be made on the same basis.

* * * * *

Dated: November 4, 1992.

Stephen R. Steinbrink,

Acting Comptroller of the Currency.

[FR Doc. 92-30937 Filed 12-21-92; 8:45 am]

BILLING CODE 4810-33-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92-NM-44-AD]

Airworthiness Directives; Airbus Industrie Model A300-600 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to all Airbus Industrie Model A300-600 series airplanes, that would have required repetitive high frequency eddy current (HFEC) inspections to detect cracks in the center spar sealing angles adjacent to the pylon rear attachment, cold work, and replacement of any cracked parts. That proposal was prompted by reports of cracks in the vertical web of the center spar sealing angles of the wing. This action revises the proposed rule by reducing the compliance time for the initial HFEC inspection for certain airplanes; extending the grace period for the initial HFEC inspection for certain airplanes; and adding inspections of the adjacent butt strap and skin panel, and repair, if necessary. The actions specified by this proposed AD are

intended to prevent crack formation in the sealing angles; such cracks could rupture and lead to subsequent crack formation in the bottom skin of the wing, resulting in reduced structural integrity of the center spar section.

DATES: Comments must be received by February 2, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-44-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4058. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Airbus Industrie, Airbus Support Division, Avenue Didier Daurat, 31700 Blagnac, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Holt, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2140; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following

statement is made: "Comments to Docket Number 92-NM-44-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-44-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations to add an airworthiness directive (AD), applicable to all Airbus Industrie Model A300-600 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the Federal Register on May 1, 1992 (57 FR 18840). That NPRM would have required repetitive high frequency eddy current (HFEC) inspections to detect cracks in the center spar sealing angles adjacent to the pylon rear attachment, cold work, and replacement of any cracked parts. That NPRM was prompted by reports of cracks in the vertical web of the center spar sealing angles of the wing. That condition, if not corrected, could result in crack formation in the sealing angles; such cracks could rupture and lead to subsequent crack formation in the bottom skin of the wing, resulting in reduced structural integrity of the center spar section.

Since the issuance of that NPRM, two commenters request that the compliance time for the initial HFEC inspection be reduced from the proposed 14,000 landings to 12,000 landings, except for those airplanes that have already exceeded 12,000 landings, in order to comply with the provisions of Airbus Industrie Service Bulletin No. A300-57-6027, dated October 8, 1991. The FAA concurs with this request. The FAA has determined that the compliance time for the initial inspection of the center spar sealing angles adjacent to Rib 8 must be reduced in order to ensure that (1) fatigue cracks are found, (2) the pair of sealing angles on the affected wing are replaced, and (3) the attachment holes are cold worked, prior to any significant reduction in the structural integrity of the center spar section. Paragraph (a) of this Supplemental NPRM has been changed to reflect the revised compliance time.

The manufacturer has provided additional crack growth data which substantiate an increase in the grace period currently proposed from 500 landings to 2,000 landings for airplanes that have accumulated fewer than 14,000 total landings. The FAA has

evaluated this data and has determined that the increase in certain grace periods, as recommended by the manufacturer, may be made without adversely affecting safety. Paragraph (a) of this Supplemental NPRM has been changed accordingly.

The Air Transport Association (ATA) of America, on behalf of one of its members, requests that the repetitive inspection intervals be extended from the proposed 6,000 landings to 15,000 landings for airplanes that have already been modified in accordance with Airbus Repair Drawing R571-40588, since the referenced Airbus Service Bulletin contains this provision. The FAA concurs partially. The manufacturer has provided additional crack growth data substantiating that, for those airplanes that have been modified in accordance with Airbus Repair Drawing R571-40588, the initial inspection should be performed within 15,000 landings after accomplishment of the modification. The FAA has evaluated this data and has determined that the increase in the initial inspection interval for airplanes already modified in accordance with the Airbus repair drawing, as recommended by the manufacturer, may be made without adversely affecting safety. Therefore, the FAA now considers that 15,000 landings for the recommended initial inspection interval, followed by repetitive inspections at intervals of 6,000 landings thereafter, is warranted for those airplanes that have already been modified in accordance with the referenced Airbus repair drawing. Accordingly, paragraph (b) has been added to this Supplemental NPRM.

Since issuance of the proposal, the FAA has determined that if any sealing angle is found to be cracked through entirely, additional inspections must be performed, prior to further flight, to detect cracks in the adjacent butt strap and skin panel. If any cracks are found in the adjacent butt strap and skin panel, they must be repaired, prior to further flight, in accordance with Airbus Repair Drawing R571-40589. Accordingly, paragraph (d) has been added to this Supplemental NPRM.

Also since issuance of the proposal, the FAA has determined that an unnecessary reporting requirement was included in paragraph (c) of the notice. The reporting requirement has been omitted from this Supplemental NPRM.

Since these changes expand the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

The FAA estimates that 30 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 12 work hours per airplane to accomplish the proposed actions, and that the average labor rate is \$55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be \$19,800, or \$660 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Airbus Industrie: Docket 92-NM-44-AD.

Applicability: All Model A300-600 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the center spar section of the wing, accomplish the following:

(a) Perform a high frequency eddy current (HFEC) inspection to detect cracks in the center spar sealing angles adjacent to Rib 8, in accordance with Airbus Industrie Service Bulletin No. A300-57-6027, dated October 8, 1991, at the times specified in paragraph (a)(1), (a)(2), or (a)(3) of this AD, as applicable:

(1) For airplanes that have accumulated less than 12,000 total landings as of the effective date of this AD: Prior to the accumulation of 12,000 total landings or within 2,000 landings after the effective date of this AD, whichever occurs later; and thereafter at intervals not to exceed 6,000 landings.

(2) For airplanes that have accumulated 12,000 total landings or more, but less than 14,000 total landings as of the effective date of this AD: Prior to the accumulation of 14,000 total landings or within 2,000 landings after the effective date of this AD; whichever occurs later; and thereafter at intervals not to exceed 6,000 landings.

(3) For airplanes that have accumulated 14,000 total landings or more as of the effective date of this AD: Prior to the accumulation of 500 landings after the effective date of this AD; and thereafter at intervals not to exceed 6,000 landings.

(b) For those airplanes on which the modification described in Airbus Repair Drawing R571-40588 has been accomplished: Prior to the accumulation of 15,000 landings after accomplishing the modification, or within 500 landings after the effective date of this AD, whichever occurs later; and thereafter at intervals not to exceed 6,000 landings, perform a HFEC inspection to detect cracks in the center spar sealing angles adjacent to Rib 8, in accordance with Airbus Industrie Service Bulletin No. A300-57-6027, dated October 8, 1991.

(c) If any crack is found in the center spar sealing angles, including cracking entirely through the sealing angle, as a result of the inspections required by paragraph (a), (b), or (d) of this AD, prior to further flight, replace the pair of sealing angles on the affected wing and cold work the attachment holes, in accordance with Airbus Industrie Service Bulletin No. A300-57-6027, dated October 8, 1991; and perform the repetitive inspections required by paragraph (b) of this AD.

(d) If any sealing angle is found to be cracked through entirely as a result of the inspections required by paragraph (a) or (b) of this AD, prior to further flight, perform additional inspections to detect cracks in the adjacent butt strap and skin panel, in accordance with paragraph 2.B.(5) of Airbus Industrie Service Bulletin No. A300-57-6027, dated October 8, 1991. If any crack is

found in the adjacent butt strap and skin panel, prior to further flight, repair it in accordance with Airbus Repair Drawing R571-40589.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM-113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(f) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 16, 1992.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31033 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 92-NM-189-AD]

Airworthiness Directives; British Aerospace Model ATP Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain British Aerospace Model ATP series airplanes. This proposal would require a one-time visual inspection to ensure that the bolt and nut assemblies on the flanged-coupling assembly on the right flap gearbox drive have split pins installed, and if split pins are missing, repetitive check tightening of the bolts until split pins are installed. This proposal is prompted by reports that during production, split pins may have been omitted from the bolt and nut assemblies on the flanged-coupling assembly. The actions specified by the proposed AD are intended to prevent possible loss of integrity and security of the flap drive system.

DATES: Comments must be received by February 18, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport

Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-189-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from British Aerospace, PLC, Librarian for Service Bulletins, P.O. Box 17414, Dulles International Airport, Washington, DC 20041-0414. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. William Schroeder, Standardization Branch, ANM-113, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2148; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-189-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate,

ANM-103, Attention: Rules Docket No. 92-NM-189-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain British Aerospace Model ATP series airplanes. The CAA advises that during production of these airplanes, split pins may have been omitted from the bolts and self-locking nuts installed on the splined flanged-coupling assembly of the primary drive torque tube located at station 0 on the right flap gearbox drive. This condition, if not corrected, could result in possible loss of integrity and security of the flap drive system.

British Aerospace has issued Service Bulletin ATP-27-55, dated August 14, 1992, which describes procedures for a one-time visual inspection to ensure that each of the four bolt and nut assemblies on the flanged-coupling assembly have split pins installed, and if split pins are missing, repetitive check tightening of the bolts until split pins are installed. The CAA classified this service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require a one-time visual inspection to ensure that the bolt and nut assemblies on the flanged-coupling assembly have split pins installed, and if split pins are missing, repetitive check tightening of the bolts until split pins are installed. The actions would be required to be accomplished in accordance with the service bulletin described previously.

The FAA estimates that 10 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 0.5 work hour per airplane to accomplish the proposed actions, and that the average labor rate is \$55 per work hour. The FAA has

confirmed that split pins have been installed in the bolt and nut assemblies on the flanged-coupling assembly on all 10 airplanes of U.S. registry. Based on these figures, there will be no cost impact of the proposed AD on U.S. operators.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

British Aerospace: Docket 92-NM-189-AD.

Applicability: Model ATP series airplanes; serial numbers 2001 through 2049, inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent possible loss of integrity and security of the flap drive system, accomplish the following:

(a) Within 14 days after the effective date of this AD, perform a one-time visual inspection of the primary flap drive torque tubes to ensure that the four bolt and nut assemblies on the splined flanged-coupling assembly on the right gearbox drive at station 0 have split pins installed, in accordance with British Aerospace Service Bulletin ATP-27-55, dated August 14, 1992.

(1) If split pins are installed, no further action is necessary.

(2) If any split pin is missing, accomplish the requirements of both paragraphs (a)(2)(i) and (a)(2)(ii) of this AD:

(i) Prior to further flight, check tighten each of the four bolts to 8 to 10 foot pounds torque. Repeat this check tightening thereafter at intervals not to exceed 14 days.

(ii) Within 6 months after the effective date of this AD, install split pins in the bolt and nut assemblies in accordance with British Aerospace Service Bulletin ATP-27-55, dated August 14, 1992. Installation of these split pins constitutes terminating action for the inspections and check tightening requirements of this paragraph.

(b) Installation of split pins in the bolt and nut assemblies in accordance with British Aerospace Service Bulletin ATP-27-55, dated August 14, 1992, constitutes terminating action for the requirements of paragraph (a) of this AD.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM-113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, ANM-113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 16, 1992.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31032 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 92-NM-180-AD]

Airworthiness Directives; Fokker Model F28 Mark 0100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Fokker Model F28 Mark 0100 series airplanes. This proposal would require inspection of the end-cap of the horizontal stabilizer dual actuator servo valve manifold to detect moisture, and removal of moisture, if necessary; and modification of the end-cap of the servo valve of the horizontal stabilizer hydraulic actuator. This proposal is prompted by reports of water ingestion in the end-cap of the dual actuator servo valve manifold. The actions specified by the proposed AD are intended to prevent jamming of the servo and to ensure that the stabilizer can be repositioned after an uncommanded trim movement.

DATES: Comments must be received by February 18, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-180-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Fokker Aircraft USA, Inc., 1199 North Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Mark Quam, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2145; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of

the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-180-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-180-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

The Rijksluchtvaartdienst (RLD), which is the airworthiness authority for the Netherlands, recently notified the FAA that an unsafe condition may exist on certain Fokker Model F28 Mark 0100 series airplanes. The RLD advises that a small number of Model F28 Mark 0100 series airplane operators have reported that the manual stabilizer trim jammed and "STAB 1" and "2 FAULT" messages were displayed on the Multi Function Display Unit (MFDU) and the overhead panel. Investigation showed that this may have been caused by water collecting inside the end-cap of the servo valve, which subsequently froze and restricted the servo valve. However, in these incidents, stabilizer control was still possible with the use of the alternate electrical trim control.

In another incident, a significant nose down pitch occurred with the crew exerting pressure on the control column, after the "STAB 1" and "2 FAULT" messages displayed on the MFDU and the overhead panel. The crew reset the stabilizer switch and engaged the autopilot, which subsequently became disengaged. The stabilizer remained jammed, despite the crew's attempt to use the manual trim and the alternate electrical trim. The crew then received subsequent "STAB 1" and "2 FAULT" messages. Using "jammed-stabilizer" procedures, the crew declared an emergency and made an uneventful landing. The cause of the failure that precipitated the nose down trim has not been established. A jammed servo, if not detected and corrected, could prohibit

repositioning of the stabilizer after an uncommanded trim movement.

Fokker has issued Service Bulletin F100-27-029, dated January 29, 1991, that describes procedures for inspection of the end-cap of the horizontal stabilizer dual actuator servo valve manifold to detect and remove moisture. Fokker has also issued Service Bulletin F100-27-032, dated September 20, 1991, that describes procedures for modification of the end-cap of the servo valve of the horizontal stabilizer hydraulic actuator. This modification, which prevents the buildup of water in the end-cap, has been accomplished, prior to delivery, on airplanes having serial number 11357 and subsequent. Fokker has issued Service Bulletin Change Notification SBF100-27-032/01, dated October 19, 1992, that corrects part numbers referenced in that service bulletin. The RLD classified the service bulletins as mandatory and issued Netherlands Airworthiness Directive BLA 91-015, Issue 2, in order to assure the continued airworthiness of these airplanes in the Netherlands.

This airplane model is manufactured in the Netherlands and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the RLD has kept the FAA informed of the situation described above. The FAA has examined the findings of the RLD, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require inspection of the end-cap of the horizontal stabilizer dual actuator servo valve manifold to detect moisture, and removal of moisture, if necessary; and modification of the end-cap of the servo valve of the horizontal stabilizer hydraulic actuator. The actions would be required to be accomplished in accordance with the service bulletins described previously.

The FAA estimates that 41 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 38 work hours per airplane to accomplish the proposed actions, and that the average labor rate is \$55 per work hour. Required parts would be provided to the operators at no cost. Based on these figures, the total cost impact of the proposed AD on U.S.

operators is estimated to be \$85,690, or \$2,090 per airplane. The FAA has been advised that the proposed requirements of this AD action have already been accomplished on 8 affected airplanes.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Fokker: Docket 92-NM-180-AD.

Applicability: Model F28 Mark 0100 airplanes, serial numbers 11244 through 11356, inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously. To prevent jamming of the servo and to ensure that the stabilizer can be repositioned after an uncommanded trim movement, accomplish the following:

(a) Within 400 hours time-in-service after the effective date of this AD, unless accomplished previously within the last 1,600 hours time-in-service, inspect the end-cap of the horizontal stabilizer dual actuator servo valve manifold to detect moisture in accordance with Fokker Service Bulletin F100-27-029, dated January 29, 1991. Prior to further flight, remove any moisture found in accordance with the service bulletin.

(b) Within 2,000 hours time-in-service or one year after the effective date of this AD, whichever occurs first, modify the end-cap of the servo valve of the horizontal stabilizer hydraulic actuator in accordance with Fokker Service Bulletin F100-27-032, dated September 20, 1991, as revised by Fokker Service Bulletin Change Notification SBF100-27-032/01, dated October 19, 1992.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM-113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 16, 1992.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31031 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 92-AEA-03]

Proposed Change of Operating Hours for Control Zone; Hagerstown, MD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: This action withdraws the Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on August 5, 1992. The NPRM proposed to change the operating hours of the Hagerstown, MD, Control Zone to be effective via a Notice to Airmen. The NPRM is being withdrawn as a result of another regulatory airspace action which duplicates the purpose intended in this proposal.

DATES: The withdrawal of the proposed rule is effective on December 22, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Designated Airspace Specialist, System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-0857.

SUPPLEMENTARY INFORMATION:

The Proposed Rule

On August 5, 1992 (57 FR 34531), a Notice of Proposed Rulemaking was published in the *Federal Register* to change the effective operating hours of the Hagerstown, MD, Control Zone to those established by a Notice to Airmen. A separate rulemaking action under Airspace Reclassification, effective October 15, 1992, has already made this change. This proposal is therefore unnecessary.

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones, Incorporation by reference.

Withdrawal of Proposed Rule

Accordingly, pursuant to the authority delegated to me, Airspace Docket No. 92-AEA-03, as published in the *Federal Register* on August 5, 1992 (57 FR 34531), is hereby withdrawn.

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

Issues in Jamaica, New York, on December 8, 1992.

Gary W. Tucker,

Manager, Air Traffic Division.

[FR Doc. 92-31003 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[FI-189-84]

RIN 1545-AH46

Debt Instruments With Original Issue Discount; Imputed Interest on Deferred Payment Sales or Exchanges of Property; Hearing

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document contains notice of a public hearing on proposed regulations relating to the tax treatment of debt instruments with original issue discount and the imputation of interest

on deferred payments under certain contracts for the sale or exchange of property.

DATES: The public hearing will be held on Tuesday, February 16, 1993, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by Tuesday, January 26, 1993.

ADDRESSES: The public hearing will be held in the Commissioner's Conference Room, room 3313, Internal Revenue Service Building, 1111 Constitution Avenue NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R, (FI-189-84), room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Carol Savage of the Regulations Unit, Assistant Chief Counsel (Corporate), 202-622-8452 or (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under sections 483, 1271 through 1275 of the Internal Revenue Code. The proposed regulations appear elsewhere in this issue of the *Federal Register*.

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Tuesday, January 26, 1993, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be permitted beyond the lobby of the Internal Revenue Service Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue.

Cynthia E. Grigsby,

Alternate Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 92-30428 Filed 12-21-92; 8:45 am]

BILLING CODE 4830-01-M

26 CFR Part 1

[CO-99-91]

RIN 1545-AQ59

Proposed Regulations Under Section 382 of the Internal Revenue Code of 1986; Limitations on Corporate Net Operating Loss; Correction

AGENCY: Internal Revenue Service, Treasury.

ACTION: Correction to notice of proposed rulemaking.

SUMMARY: This document contains corrections to proposed regulations (CO-99-91), which were published Thursday, November 5, 1992 (57 FR 52738). The proposed regulations modify existing rules that require segregation of public groups following stock issuances for purposes of determining whether an ownership change has occurred.

FOR FURTHER INFORMATION CONTACT: Roberta F. Mann, 202-622-7550 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking that is the subject of these corrections relates to section 382 of the Internal Revenue Code.

Need for Correction

As published, the proposed rulemaking contain errors which may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the proposed regulations (CO-99-91), which was the subject of FR Doc. 92-26159, is corrected as follows:

§ 1.382-3 [Corrected]

Paragraph 1. On page 52741, column 2, in § 1.382-3, paragraph (j)(1), line 4, the language "Introduction. This section exempts, in" is corrected to read "Introduction. This paragraph (j) exempts, in". In line 9, the language "used in this section, and not otherwise" is corrected to read "used in this paragraph (j), and not otherwise".

Par. 2. On page 52741, column 3, in § 1.382-3, paragraph (j)(2)(iii)(D), line 3,

the language "on a per share basis if, during the" is corrected to read "on a class-by-class basis if, during the".

Par. 3. On page 52742, column 2, in § 1.382-3, paragraph (j)(7), line 4, the language "section, the transitory ownership of" is corrected to read "paragraph (j), the transitory ownership of".

Par. 4. On page 52742, column 2, in § 1.382-3, paragraph (j)(8), line 2, the language "purposes of this section, two or more" is corrected to read "purposes of this paragraph (j), two or more".

Par. 5. On page 52742, column 2, in § 1.382-3, paragraph (j)(8)(ii), last line, the language "this section." is corrected to read "this paragraph (j).".

Par. 6. On page 52742, column 2, in § 1.382-3, paragraph (j)(9), line 2, the language "principles of this section apply for" is corrected to read "principles of this paragraph (j) apply for".

Par. 7. On page 52742, column 2, in § 1.382-3, paragraph (j)(10), line 3, the language "section apply to issuances of stock by a" is corrected to read "paragraph (j) apply to issuances of stock by a".

Par. 8. On page 52742, column 2, in § 1.382-3, paragraph (j)(11), last line, the language "as stock for purposes of this section" is corrected to read "as stock for purposes of this paragraph (j).".

Par. 9. On page 52743, column 1, in § 1.382-3, paragraph (j)(13)(i), line 2, the language "This section applies to issuances of" is corrected to read "This paragraph (j) applies to issuances of".

Par. 10. On page 52743, column 1, in § 1.382-3, paragraph (j)(13)(ii), line 1, the language "(ii) Election to apply this section" is corrected to read "(ii) Election to apply this paragraph (j)". In line 3, the language "Election to apply this section" is corrected to read "Election to apply this paragraph (j)". In line 5, the language "elect to apply this section to all" is corrected to read "elect to apply this paragraph (j) to all".

Par. 11. On page 52743, column 1, in § 1.382-3, paragraph (j)(13)(ii)(B), last line, the language "years applying this section." is corrected to read "years applying this paragraph (j).".

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 92-30808 Filed 12-21-92; 8:45 am]

BILLING CODE 4830-01-M

26 CFR Part 1

[FI-189-84]

RIN 1545-AH46

Debt Instruments With Original Issue Discount; Imputed Interest on Deferred Payment Sales or Exchanges of Property

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the tax treatment of debt instruments with original issue discount and the imputation of interest on deferred payments under certain contracts for the sale or exchange of property. The proposed regulations in this document revise some of the proposed regulations that were published in the *Federal Register* on April 8, 1986. The proposed regulations would provide needed guidance to holders and issuers of debt instruments with original issue discount and to buyers and sellers of property.

DATES: A public hearing on these proposed regulations is scheduled for 10 a.m. on February 16, 1993, in room 3313 at 1111 Constitution Avenue NW., Washington, DC. Requests to appear at the public hearing and outlines of oral comments must be received by January 26, 1993. Written comments must be received by January 26, 1993. See notice of hearing published elsewhere in this issue of the *Federal Register*.

ADDRESSES: Send comments, requests to appear, and outlines of oral comments to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R (FI-189-84), room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Frederick S. Campbell-Mohn, (202) 622-3940 (not a toll-free number), William E. Blanchard, (202) 622-3950 (not a toll-free number), or Andrew C. Kittler, (202) 622-3940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information requirements contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to

the Internal Revenue Service, Attn: IRS Reports Clearance Officer T:FP, Washington, DC 20224.

The required collections of information in this regulation are in §§ 1.1272-(d)(2)(iii), 1.1272-3, 1.1273-2(f)(2), 1.1274-3(d), 1.1274-5(b), 1.1274A-1(c), and 1.1275-3(b). This information is required by the Internal Revenue Service in connection with tracking the accrual of original issue discount. This information will be used for audit and examination purposes. The likely respondents are businesses or other for-profit institutions.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require more or less time, depending on their particular circumstances.

Estimated total reporting burden: 289,500 hours.

The estimated burden per respondent varies from .3 to .5 hours, depending on individual circumstances, with an estimated average of .4 hours.

Estimated number of respondents: 750,000.

Estimated annual frequency of responses: 1.

Background

On April 8, 1986, the *Federal Register* published a notice of proposed rulemaking (51 FR 12022) relating to original issue discount (OID) under section 163(e) and sections 1271 through 1275, unstated interest under section 483, and the accrual of interest under section 446. The notice also included proposed amendments to the regulations under related provisions of the Internal Revenue Code. The proposed regulations were subsequently amended on September 7, 1989 (54 FR 37125), February 28, 1991 (56 FR 8308), May 7, 1991 (56 FR 21112) and July 12, 1991 (56 FR 31887). The proposed regulations that were issued in 1986, as amended in 1989 and 1991, are hereinafter referred to as the 1986 proposed regulations.

Explanation of Provisions

Numerous written comments were made on the 1986 proposed regulations. In addition, on November 17, 1986, the Internal Revenue Service held a public hearing on the 1986 proposed regulations. In general, commentators criticized the complexity and length of the 1986 proposed regulations, as well as the narrow definitions of certain terms, including the definitions of accrual period, qualified periodic

interest payment, variable rate debt instrument, and de minimis OID.

In response to these comments, the proposed regulations simplify the rules that were in the 1986 proposed regulations and, as explained below, provide more flexible definitions of certain terms for purposes of these rules. The proposed regulations attempt to conform the rules to normal commercial practices and to exclude from their application debt instruments with limited potential to defer or accelerate interest.

The proposed regulations are significantly shorter in length than the 1986 proposed regulations. The shorter length is generally attributable to the simplification of the rules and the elimination of rules that are also in the statute. In addition, because the proposed regulations are proposed to be effective for debt instruments issued on or after the date that is 60 days after the date the regulations are finalized, the proposed regulations do not include the numerous transitional rules that were in the 1986 proposed regulations.

The proposed regulations do not amend the rules for contingent payments that are in § 1.1275-4 of the 1986 proposed regulations. These rules will be addressed in future regulations.

In general, the major changes from the 1986 proposed regulations are noted as follows:

Section 1.163-7 Deduction for OID on Certain Debt Instruments

The proposed regulations allow the issuer of a debt instrument with a de minimis amount of OID to deduct the OID using a straight line method rather than a constant yield method. In addition, if an issuer redeems a debt instrument for the issuer's newly issued debt instrument, the proposed regulations provide rules to determine the amount of the repurchase premium, if any, on the redemption and the timing of the issuer's deduction for the repurchase premium. To determine the amount of the repurchase premium, the issuer's repurchase price for the debt instrument is the issue price of the newly issued debt instrument (reduced by any unstated interest). However, if the issue price of the newly issued debt instrument is determined under either section 1273(b)(4) or section 1274, any repurchase premium on the redemption is amortized by the issuer over the term of the newly issued instrument in the same manner as if it were OID on the instrument.

Section 1.446-2 Method of Accounting for Interest

The proposed regulations clarify that unstated interest, as determined under section 483, is taken into account by the buyer and the seller based on their respective methods of accounting for stated interest.

Request for comments: In general, the proposed regulations require the use of the constant yield method to determine interest accruals. However, the proposed regulations generally respect the allocation of payments under a lending or sales contract if (1) the aggregate amount of payments due under the contract does not exceed \$250,000, (2) the contract does not have unstated interest, and (3) the debt instrument evidencing the contract is not issued at a discount. This small transaction exception was also in the 1986 proposed regulations. The exception, however, has a limited scope, and taxpayers must still determine whether interest is prepaid under their allocation. Comments are requested as to whether the final regulations should keep this exception. Comments are also requested as to whether the final regulations should allow the use of the Rule of 78's (or any other method) to allocate interest on consumer loans that are not within the small transaction exception, including loans issued for cash.

Section 1.483-1 through 1.483-3 Unstated Interest

For purposes of the lower test rate under section 483(e) for certain sales or exchanges of land between related individuals, the proposed regulations allow the use of the lower rate for a single debt instrument to the extent the stated principal amount of the instrument does not exceed \$500,000. For example, if the stated principal amount of the debt instrument is \$700,000, the proposed regulations treat the instrument as two instruments: A \$500,000 debt instrument, which is eligible for the lower test rate, and a \$200,000 debt instrument. The 1986 proposed regulations only allowed the lower rate if a separate debt instrument was issued for the principal amount in excess of \$500,000.

Sections 1.1001-1(g) and 1.1012-1(g) Amount Realized and Basis

The proposed regulations provide that the issue price of a debt instrument issued in a sale or exchange of property determines the seller's amount realized and the buyer's basis in the property. However, the proposed regulations provide that if the issue price of the debt

instrument equals the instrument's stated redemption price at maturity under section 1273(b)(4), the issue price is reduced by any unstated interest for purposes of sections 1001 and 1012.

Section 1.1271-1 Special Rules Applicable to Amounts Received on Retirement, Sale or Exchange of Debt Instruments

Under section 1271, if there is an intention to call a debt instrument prior to maturity, the gain on the sale, exchange, or retirement of the debt instrument is treated as ordinary income to the extent of any unaccrued OID. The proposed regulations add rules to determine when there is an intention to call the debt instrument prior to maturity. An intention to call exists only if there is an agreement not provided for in the debt instrument that the issuer will redeem the instrument prior to maturity. For example, a mandatory sinking fund provision or call option is not evidence of an intention to call under section 1271. The proposed regulations also provide that the intention to call rules do not apply to publicly offered debt instruments or to debt instruments subject to section 1272(a)(6).

Section 1.1272-1 Current Inclusion in Income of OID

The proposed regulations provide that the amount of OID that accrues during an accrual period is determined using the constant yield method. For purposes of this determination, the 1986 proposed regulations required that all accrual periods on a debt instrument (other than a short initial or final accrual period) be of equal length. The proposed regulations, however, allow the use of accrual periods of different lengths of not more than one year. In determining the amount of OID accruals, the yield of the debt instrument must be adjusted to take into account the length of the particular accrual period if accrual periods of different lengths are used.

The proposed regulations also provide new rules to determine the yield and maturity of a debt instrument with a stated contingency that could result in the acceleration or deferral of payments if the amounts payable upon the occurrence of the contingency are fixed. In general, the contingency is ignored. However, if, based on all the facts and circumstances, the contingency is more likely than not to occur, it is assumed that the contingency will occur. In addition, special rules that were in the 1986 proposed regulations for a debt instrument with a put option, call option, or option to extend are retained,

and extended to a debt instrument with an option to pay interest in the form of additional debt instruments of the issuer.

If a debt instrument is partially prepaid, the proposed regulations provide that the payment is subject to the payment ordering rule under § 1.1275-2. In general, the payment reduces the adjusted issue price of the debt instrument. For purposes of OID accruals after the prepayment, the yield of the debt instrument is not adjusted for the prepayment. However, any shortfall created as a result of the prepayment is treated as OID and allocated to the final accrual period. See § 1.1272-1(c)(2).

Section 1.1272-2 Treatment of Debt Instruments Purchased at a Premium

The proposed regulations define the term purchase as any acquisition of a debt instrument. In addition, the proposed regulations provide new rules to determine the adjusted basis of a debt instrument for purposes of determining whether a holder has acquired a debt instrument at a premium or at an acquisition premium.

Section 1.1272-3 Election by Accrual Method Holder To Treat All Interest on a Debt Instrument as OID

Under the proposed regulations, a holder that uses an accrual method of accounting may elect to treat all interest on a debt instrument as OID. For purposes of the election, interest includes stated interest, OID, market discount, de minimis OID and market discount, acquisition discount, and unstated interest, as adjusted for any acquisition premium or amortizable bond premium. In effect, the election simplifies the calculation of interest income for the holder by applying a single method (constant yield method) to determine the timing and amount of interest income on the debt instrument (e.g., a holder that acquires a debt instrument with acquisition premium need not calculate and use the acquisition premium fraction).

Request for comments: The proposed regulations impose certain conditions on the use of the election. In general, the conditions are similar to those in the market discount and amortizable bond premium rules. For example, if the election is made for a debt instrument with amortizable bond premium or with market discount, the holder becomes subject to the conformity requirements of section 171 or section 1278(b), whichever is applicable. Comments are requested as to whether the final regulations should retain the conformity requirements and other conditions.

Section 1.1273-1 Definition of OID

OID is defined as the excess of a debt instrument's stated redemption price at maturity over the instrument's issue price. Under the 1986 proposed regulations, a debt instrument's stated redemption price at maturity was defined as the sum of all payments due under the instrument other than qualified periodic interest payments. In general, qualified periodic interest payments were defined as a series of payments equal to the product of the outstanding principal balance of the debt instrument and a single fixed rate of interest that is actually and unconditionally payable at fixed periodic intervals of one year or less during the entire term of the debt instrument (including short periods).

The proposed regulations, by providing a more flexible approach to the treatment of stated interest, generally exclude from their application debt instruments with limited potential to defer or accelerate interest. Under the proposed regulations, "qualified stated interest" is the term used to refer to stated interest that is not includable in the debt instrument's stated redemption price at maturity. Qualified stated interest for a fixed-rate debt instrument is stated interest that is unconditionally payable in cash or in property (other than debt instruments of the issuer) at least annually at a single fixed rate. Interest is payable at a single fixed rate only if the rate appropriately takes into account the length of the interval between payments.

The proposed regulations provide that no stated interest on a short-term obligation is qualified stated interest. Therefore, all stated interest payments on a short-term obligation are included in its stated redemption price at maturity. In response to comments made on the 1986 proposed regulations, which had the same rule, the rule applies for purposes of sections 871 and 881.

The proposed regulations provide an additional rule to determine when a debt instrument with an interest holiday or a teaser rate has a de minimis amount of OID. Under this rule, the amount of OID resulting from an interest holiday or a teaser rate is generally the amount of interest foregone during the holiday or teaser period. The instrument is then tested under the general de minimis rules to determine whether the debt instrument has a de minimis OID. For example, under this rule, a 30-year self-amortizing mortgage loan with a fixed interest rate of 8.5 percent, compounded monthly, but a 2-year teaser rate of 6

percent, compounded monthly, would have only a de minimis amount of OID.

The proposed regulations also add rules for the treatment of de minimis OID by the holder. A holder includes de minimis OID in income on a pro rata basis as principal payments are made on the debt instrument. In addition, any gain attributable to de minimis OID that is recognized upon the sale or exchange of a debt instrument is capital gain if the instrument is a capital asset in the hands of the holder. A similar rule was provided in § 1.1232-3(b)(1)(ii).

Section 1.1273-2 Determination of Issue Price

The proposed regulations provide new rules to determine when a debt instrument is publicly traded or is issued for property that is publicly traded for purposes of determining the issue price of the debt instrument. In general, a debt instrument or property (stock, security, contract, commodity, or currency) is publicly traded if, at any time during a 60-day period ending 30 days after the issue date of the debt instrument, the debt instrument or property is traded on an established market. A debt instrument or property is traded on an established market if (1) it is listed on certain securities exchanges, interdealer quotation systems, or designated foreign exchanges or boards of trade, (2) it is traded on a designated contract market or an interbank market, (3) it appears on a system of general circulation that provides a reasonable basis to determine fair market value by disseminating either recent price quotations of identified brokers and dealers or actual prices of recent sales transactions, or (4) price quotations with respect to the debt instrument are readily available from dealers and brokers. Price quotations are deemed not readily available if (1) no other outstanding debt of the issuer is traded on an established market, (2) the original stated principal amount of the issue is less than \$25 million, (3) all other issues of the issuer's debt that are traded on an established market impose materially more restrictive covenants or conditions on the issuer, or (4) the maturity date of the debt instrument is more than 3 years after the latest maturity date of all other issues of the issuer that are traded on an established market.

The proposed regulations allocate the issue price of an investment unit between the components of the unit based on their relative fair market values. The 1986 proposed regulations provided allocation rules that generally restated common law valuation principles. Unlike the 1986 proposed

regulations, the proposed regulations do not provide specific allocation rules. Under the proposed regulations, however, the holder of an investment unit must use the issuer's allocation unless the holder discloses on its Federal income tax return that it plans to use an allocation that is inconsistent with the issuer's allocation.

The 1986 proposed regulations provided that no portion of the issue price of a debt instrument is allocated to a right to convert the instrument into stock of the issuer. However, after the amendments proposed on February 28, 1991, if the conversion right could be satisfied in cash, the 1986 proposed regulations allocated a portion of the issue price of the debt instrument to the conversion right. The proposed regulations modify these rules by providing that no portion of the issue price of a debt instrument is allocated to a right to convert the instrument into stock of the issuer or a party related to the issuer, even if the conversion right may be satisfied in cash.

The proposed regulations change the lender's treatment of a payment of points made incident to a lending transaction. Under the proposed regulations, a payment of points (including a payment of points that is deductible by the borrower under section 461(g)(2)) reduces the issue price of the debt instrument, thereby creating OID on the instrument. If the amount of OID created under this rule is de minimis, the proposed regulations treat the OID in the same manner as any other amount of de minimis OID. By contrast, the 1986 proposed regulations required that the lender include the payment in income when received, regardless of the lender's method of accounting. See § 1.446-2(e) of the 1986 proposed regulations.

Sections 1.1274-1 Through 1.1274-5 Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

The proposed regulations restructure and simplify the rules that were in sections 1.1274-1 through 1.1274-7 of the 1986 proposed regulations.

The proposed regulations modify the 1986 proposed regulations by providing that the issue price of a debt instrument issued for nonpublicly traded property in a potentially abusive situation is the fair market value of the property. In addition, the proposed regulations treat a debt instrument with clearly excessive interest as issued in a potentially abusive situation. The proposed regulations also provide that, for purposes of the potentially abusive rules, the term nonrecourse financing

does not include a sale or exchange of a real property interest financed by a nonrecourse debt instrument, if, in addition to the instrument, the purchaser provides a down payment that is at least 20 percent of the total stated purchase price of the interest.

The proposed regulations provide new rules to determine the imputed principal amount of a debt instrument if the instrument provides for contingent payments. Under the proposed regulations, the imputed principal amount generally is the sum of the present values of the noncontingent payments and the fair market value of the contingent payments. If the fair market value of the contingent payments cannot be determined when separated from the noncontingent payments, the imputed principal amount is the fair market value of the debt instrument. Only in rare and extraordinary cases will the fair market value of the debt instrument be treated as not reasonably ascertainable.

The proposed regulations provide new rules to determine the test rate of interest for an installment obligation. Unlike the 1986 proposed regulations, which had three alternative rules, the proposed regulations use a single rule that uses the weighted average maturity of the debt instrument to determine the test rate.

The proposed regulations no longer contain the transitional rule in the 1986 proposed regulations that provided that section 1274 applied to a modified debt instrument only if the original debt instrument was subject to section 1274.

The proposed regulations limit the use of a test rate that is lower than the applicable Federal rate to debt instruments having a maturity of six months or less (or to debt instruments with a qualified floating rate of interest that is reset at least every six months). For debt instruments having a maturity of less than three months, the proposed regulations modify the 1986 proposed regulations and provide that the allowable Treasury index rate is the market yield on U.S. Treasury bills with the same maturity as the debt instrument.

The proposed regulations provide new rules for debt instruments that are materially modified in connection with an assumption of a debt instrument as part of a sale or exchange of property. In general, the modification is treated as a separate transaction that takes place immediately before the sale or exchange and is attributed to the seller. The seller and buyer, however, may jointly elect to treat the transaction as one in which the buyer first assumed the unmodified debt

instrument and subsequently modified the debt instrument.

Request for comments: The proposed regulations provide rules to determine the issue price of a debt instrument subject to an option that allows a holder or issuer the unconditional right to accelerate or defer payments (including a put option, call option, or option to extend the maturity of an instrument). These rules are similar to rules contained in the 1986 proposed regulations. Comments are requested regarding the appropriateness of these rules and regarding whether these rules should be extended to options subject to contingencies that affect the right to exercise or the amounts payable in the event of exercise.

The proposed regulations do not provide any limitations on "recent sales transactions" that are subject to the potentially abusive situation rules. Comments are requested on the limitations, if any, that should be included in the final regulations.

Section 1.1274A-1 Special Rules for Certain Transactions Where Stated Principal Amount Does Not Exceed \$2,800,000

The proposed regulations revise the rules for making a cash method election. The proposed regulations also allow a cash method election for a debt instrument that was issued in a debt-for-debt exchange, subject to an anti-abuse rule, if the instrument otherwise qualifies as a cash method debt instrument. The 1986 proposed regulations only allowed the election if the "old" debt instrument was a cash method debt instrument. In addition, the proposed regulations disallow interest deductions for a debt instrument that is incurred or continued to purchase or carry a cash method debt instrument.

Section 1.1275-1 Definitions

The term "debt instrument" is defined as any instrument or contractual arrangement that constitutes indebtedness under general principles of Federal income tax law. Based on this definition, the proposed regulations treat a payment of stock pursuant to a contingent stock payout under section 483, rather than under the OID provisions. See Example 3 in § 1.446-2(h).

Section 1.1275-2 Special Rules Relating to Debt Instruments

The proposed regulations revise the aggregation rules that were in the 1986 proposed regulations. In general, only debt instruments that are issued by a single issuer to a single holder are

aggregated. The Commissioner, however, may aggregate debt instruments that are issued by more than one issuer or that are issued to more than one holder if the debt instruments are issued in an arrangement that is designed to avoid the aggregation rule. In addition, if under the terms of a debt instrument the holder may receive one or more additional debt instruments of the issuer, the additional debt instruments are aggregated with the original debt instrument.

The proposed regulations also provide a specific payment ordering rule for purposes of the OID provisions. In addition, the proposed regulations add rules for qualified reopenings of Treasury securities.

Section 1.1275-3 OID Information Reporting Requirements

The 1986 proposed regulations generally required an issuer of a debt instrument with OID to legend the instrument with certain information. The proposed regulations provide that debt instruments do not have to be legended if the instruments are publicly offered or are issued by individuals. In addition, the proposed regulations except a debt instrument from legending if the instrument is not evidenced by a physical document. In the case of a debt instrument that has to be legended, the proposed regulations provide new rules that should simplify compliance with the legending requirement. As an alternative to detailed legending of OID information, the proposed regulations permit the issuer to provide the address or telephone number of a representative of the issuer who will promptly give the OID information to the holder upon request.

Section 1.1275-5 Variable Rate Debt Instruments

The proposed regulations substantially expand the definition of the term "variable rate debt instrument." In general, a variable rate debt instrument is a debt instrument that provides for stated interest (compounded or paid at least annually) at a qualified floating rate, an objective rate, a fixed rate followed by a qualified floating rate, or a qualified floating rate followed by another qualified floating rate. A qualified floating rate generally is an interest-like rate, such as the applicable Federal rate or LIBOR. An objective rate generally is a rate based on the price of property that is actively traded (other than foreign currency) or an index of the prices of such property. An objective rate is also a rate that is based on one or more qualified floating

rates (unless the rate itself is a qualified floating rate). For example, a multiple of a qualified floating rate is an objective rate.

For purposes of determining whether a variable rate debt instrument has OID, the proposed regulations generally treat all stated interest on the instrument that is unconditionally payable at least annually as qualified stated interest. If, however, the debt instrument provides for stated interest at a fixed rate followed by a qualified floating rate or a qualified floating rate followed by a different qualified floating rate, the instrument may have accelerated or deferred interest, which is not qualified stated interest. For example, if a ten-year debt instrument provides for annual interest payments for the first five years equal to the value of one-year LIBOR on each payment date and for the last five years equal to the value of one-year LIBOR on each payment date plus 200 basis points, the 200 basis points in the last five years is deferred interest.

The proposed regulations also provide rules for the accrual of OID on variable rate debt instruments. In general, if the OID is attributable to accelerated or deferred interest or to "true discount" (the excess of a debt instrument's stated principal amount over its issue price), the OID is allocated to an accrual period under the rules of section 1272. The allocation, however, is determined by assuming that the debt instrument provided for qualified stated interest payments at the end of each accrual period based on a reasonable fixed rate.

The proposed regulations provide a special rule for certain tax-exempt debt instruments that provide for stated interest at an objective rate. If the issuer of a tax-exempt debt instrument, contemporaneously with the issuance, enters into one or more financial contracts that substantially offset the variations in the objective rate, the debt instrument is not a variable rate debt instrument. The Treasury Department and the Internal Revenue Service are considering the appropriate treatment of tax-exempt debt instruments with embedded options, forwards, and swaps.

Request for comments: The 1986 proposed regulations did not provide clear guidance on the treatment of a debt instrument that provided for one or more variable interest rates or a combination of a fixed and a variable interest rate. The proposed regulations provide guidance for the treatment of these debt instruments. In general, the proposed regulations attempt to provide rules that reflect the economics of these debt instruments and limit the acceleration or deferral of interest.

Comments are requested on the appropriateness of these rules, including the rules for accelerated and deferred interest.

As noted above, the proposed regulations provide a special rule for certain tax-exempt debt instruments with stated interest at an objective rate. Comments are requested on the appropriateness of this rule.

Comments are requested on whether there should be a consistency rule for debt instruments with accelerated interest or deferred interest.

Effective Dates

The proposed regulations are proposed to be effective for debt instruments issued on or after the date that is 60 days after the date the regulations are finalized. The proposed regulations are also proposed to be effective for lending transactions, sales and exchanges that occur on or after the date that is 60 days after the date the regulations are finalized. The rules for qualified reopenings of Treasury securities, however, will be effective for reopenings on or after March 25, 1992.

The Internal Revenue Service intends to treat the 1986 proposed regulations that are withdrawn in this document as authority under section 6662 for debt instruments issued prior to their withdrawal and for lending transactions, sales and exchanges that occurred prior to their withdrawal.

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, an initial Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted, consideration will be given to any written comments that are timely submitted (preferably a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety.

A public hearing on these proposed regulations will be held on February 16,

1993, at 10 a.m. See the notice of public hearing published elsewhere in this issue of the *Federal Register*.

Drafting Information

The principal authors of these regulations are Frederick S. Campbell-Mohn, William E. Blanchard, and Andrew C. Kittler of the Office of Assistant Chief Counsel (Financial Institutions and Products), Internal Revenue Service. However, other personnel from the Service and Treasury Department participated in their development.

List of Subjects

26 CFR 1.161-1 Through 1.194-4

Income taxes, Reporting and recordkeeping requirements.

26 CFR 1.446-1 Through 1.448-2T

Accounting, Income taxes, Reporting and recordkeeping requirements.

26 CFR 1.1001-1 Through 1.1002-1

Income taxes.

26 CFR 1.1011-1 Through 1.1021-1

Income taxes, Reporting and recordkeeping requirements.

26 CFR 1.1231-1 Through 1.1297-3T

Income taxes.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART I—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding the following citations:

Authority: 26 U.S.C. 7805 * * * Sections 1.483-1 through 1.483-3 also issued under 26 U.S.C. 483(g). Sections 1.1271-1 through 1.1275-5 also issued under 26 U.S.C. 1275(d). Section 1.1274A-1 also issued under 26 U.S.C. 1274A(e).

Par. 2. Section 1.163-7, as proposed on April 8, 1986 (51 FR 12030), is revised to read as follows:

§ 1.163-7 Deduction for OID on certain debt instruments.

(a) *General rule.* Except as otherwise provided in paragraph (b) of this section, the amount of OID that an issuer (or transferee) deducts each year under section 163(e)(1) is determined in accordance with section 1272 without regard to section 1272(a)(7) (relating to acquisition premium). An issuer (or transferee) is permitted a deduction under section 163(e)(1) only to the extent the issuer (or transferee) is

primarily liable on the debt instrument. For certain limitations on the deductibility of OID by the issuer (or transferee), see sections 163(e)(2)(C), 163(e)(3), 163(e)(4), 163(e)(5), and 1275(b)(2).

(b) *Special rules for de minimis OID—*

(1) *In general.* Except as provided in paragraph (b)(2) of this section, a debt instrument has OID for purposes of section 163(e) even if the amount of OID is de minimis within the meaning of section 1273(a)(3) and the regulations thereunder.

(2) *Stated interest.* If a debt instrument has a de minimis amount of OID (within the meaning of § 1.1273-1(d)), all stated interest on the debt instrument is treated as qualified stated interest. See § 1.446-2(b) for the treatment of qualified stated interest.

(3) *Deduction of de minimis OID on straight-line basis.* The issuer of a debt instrument with a de minimis amount of OID (other than a de minimis amount treated as qualified stated interest under paragraph (b)(2) of this section) may choose to deduct the OID on a straight-line basis over the term of the debt instrument. The issuer must make this choice on the issuer's timely filed Federal income tax return for the taxable year in which the debt instrument is issued.

(c) *Deduction upon repurchase.* Except to the extent disallowed by any other section of the Internal Revenue Code (e.g., section 249), or this paragraph (c), if a debt instrument is repurchased by the issuer for a price in excess of its adjusted issue price (as defined in § 1.1275-1(b)), the excess (repurchase premium) is deductible as interest for the taxable year. If the issuer repurchases a debt instrument in a debt-for-debt exchange, the repurchase price is the issue price of the newly issued debt instrument (reduced by any unstated interest within the meaning of section 483). However, if the issue price of the newly issued debt instrument is determined under either section 1273(b)(4) or section 1274, any repurchase premium is not deductible in the year of the repurchase, but is amortized over the term of the newly issued debt instrument in the same manner as if it were OID.

Par. 3. Section 1.446-2, as proposed on April 8, 1986 (51 FR 12031), is revised to read as follows:

§ 1.446-2 Method of accounting for interest.

(a) *Applicability—(1) In general.* This section provides rules for determining the amount of interest that accrues during an accrual period (other than interest described in paragraph (a)(2) of

this section). For purposes of this section, "interest" includes amounts treated as interest (whether stated or unstated) in any lending or deferred payment transaction. Accrued interest determined under this section is taken into account by a taxpayer under the taxpayer's regular method of accounting (e.g., an accrual method or the cash receipts and disbursements method). Application of an exception described in paragraph (a)(2) of this section to one party to a lending or deferred payment transaction does not affect the application of this section to any other party to the transaction.

(2) *Exceptions—(i) Interest included or deducted under certain other provisions.* This section does not apply to interest that is taken into account under—

(A) Sections 1272(a), 1275, and 163(e) (income and deductions relating to original issue discount);

(B) Section 467(a)(2) (certain payments for the use of property or services);

(C) Sections 1276 through 1278 (market discount);

(D) Sections 1281 through 1283 (discount on certain short-term obligations);

(E) Section 7872(a) (certain loans with below-market interest rates); or

(F) Section 1.1272-3 (an election by a holder that uses the accrual method of accounting to treat all interest on a debt instrument as original issue discount).

(ii) *De minimis original issue discount.* This section does not apply to de minimis amounts of original issue discount as determined under section 1273(a)(3) and the regulations thereunder. See §§ 1.1273-1(d)(6) and 1.1272-3 for the treatment of de minimis original issue discount by the holder.

(b) *Accrual of qualified stated interest.* Qualified stated interest (as defined in § 1.1273-1(c)) accrues ratably over the accrual period to which it is attributable and accrues at the stated rate for that period.

(c) *Accrual of interest other than qualified stated interest.* Subject to the modifications in paragraph (d) of this section, the amount of interest that accrues for any accrual period is determined under rules similar to those in §§ 1.1272-1, 1.1275-4, and 1.1275-5. The preceding sentence applies regardless of any contrary formula agreed to by the parties.

(d) *Modifications—(1) Issue price.* The issue price of the loan or contract is equal to—

(i) In the case of a deferred payment contract to which section 483 applies,

the amount described in § 1.483-2(a)(1) (i) or (ii), whichever is applicable; or (ii) In any other case, the amount loaned.

(2) *Adjusted issue price.* The adjusted issue price of the loan or contract is modified in the case of a contract to which section 483 applies by excluding from the calculation any principal payment that is not a deferred payment.

(3) *Qualified stated interest.* No interest payments are treated as qualified stated interest payments.

(e) *Allocation of interest to payments—(1) In general.* Except as provided in paragraphs (e)(2) and (e)(3) of this section, each payment under a loan (other than payments of additional interest or similar charges provided with respect to amounts that are not paid when due) is treated as a payment of interest to the extent of the accrued and unpaid interest as of the date the payment becomes due. Any remaining amount is treated as a payment of principal.

(2) *Special rule for points deductible under section 461(g)(2).* If a payment of points is deductible by the borrower under section 461(g)(2), the payment is treated by the borrower as a payment of interest.

(3) *Allocation respected in certain small transactions—(i) In general.* If the aggregate amount of interest and principal payable under a contract does not exceed \$250,000 and section 483 does not apply to the loan, an express allocation of the payments between interest and principal by the parties is respected. Similarly, if section 483 applies to a contract under which the aggregate amount payable does not exceed \$250,000, but does not apply to a party to the contract (as, for example, in the case of an obligor under a debt instrument given in consideration for the sale or exchange of personal use property), an express allocation of the payments between interest and principal by the parties is respected for purposes of determining the tax liability of the party not subject to section 483.

(ii) *Prepaid interest.* The amount of interest allocated to any payment under this paragraph (e)(3) is treated as prepaid interest to the extent the amount exceeds—

(A) The aggregate amount of accrued interest as of the date the payment becomes due; reduced (but not below zero) by

(B) The aggregate amount of interest allocated to prior payments under this paragraph (e)(3).

(iii) *Accounting for prepaid interest.* Prepaid interest must be included in income by a lender when received, regardless of the lender's method of

accounting. Except as otherwise provided in section 461(g)(2), prepaid interest is not deductible before such interest accrues (as determined under paragraph (c) of this section).

(f) *Aggregation rule.* For purposes of this section, all sales or exchanges that are part of the same transaction (or a series of related transactions) are treated as a single sale or exchange and all contracts calling for deferred payments arising from the same transaction (or a series of related transactions) are treated as a single contract.

(g) *Debt instruments denominated in a currency other than the U.S. dollar.* The rules of this section apply to debt instruments that provide for payments denominated in, or determined by reference to, the functional currency of the taxpayer or qualified business unit of the taxpayer (even if that currency is other than the U.S. dollar). See § 1.988-2(b) to determine interest income or expense for debt instruments that provide for payments denominated in, or determined by reference to, a nonfunctional currency.

(h) *Examples.* The principles of this section are illustrated by the following examples.

Example 1. Allocation of unstated interest to deferred payments—(i) Facts. On July 1, 1996, A sells his personal residence to B for a stated purchase price of \$1,297,143.66. The property is not personal use property (within the meaning of section 1275(b)(3)) in the hands of B. Under the loan agreement, B is required to make two installment payments of \$648,571.83, the first due on June 30, 1998, and the second due on June 30, 2000. Both A and B use the cash receipts and disbursements method of accounting and use a calendar year for their taxable year.

(ii) *Amount of unstated interest.* Under section 483, the agreement does not provide for adequate stated interest. Thus, the loan's yield is the test rate of interest determined under § 1.483-3. Assume that both A and B use annual accrual periods and that the test rate of interest is 9.2 percent, compounded annually. Under § 1.483-2, the present value of the deferred payments is \$1,000,000. Thus, the agreement has unstated interest of \$297,143.66.

(iii) *First two accrual periods.* Under paragraph (d)(1) of this section, the issue price at the beginning of the first accrual period is \$1,000,000 (the amount described in § 1.483-2(a)(1)(i)). Under paragraph (c) of this section, the amount of interest that accrues for the first accrual period is \$92,000 ($\$1,000,000 \times .092$) and the amount of interest that accrues for the second accrual period is \$100,464 ($\$1,092,000 \times .092$). Thus, \$192,464.00 of interest has accrued as of the end of the second accrual period. Under paragraph (e)(1) of this section, the \$648,571.83 payment made on June 30, 1998, is treated first as a payment of interest to the extent of \$192,464.00. The remainder of the payment (\$456,107.83) is treated as a

payment of principal. Both A and B take the payment of interest (\$192,464.00) into account in 1998.

(iv) *Second two accrual periods.* The adjusted issue price at the beginning of the third accrual period is \$543,892.17 ($\$1,092,000 + \$100,464 - \$649,571.83$). The amount of interest that accrues for the third accrual period is \$50,038.08 ($\$543,892.17 \times .092$) and the amount of interest that accrues for the final accrual period is \$54,641.58, the excess of the amount payable at maturity (\$648,571.83), over the adjusted issue price at the beginning of the accrual period (\$593,930.25). As of the date the second payment becomes due, \$104,679.66 of interest has accrued. Thus, of the \$648,571.83 payment made on June 30, 2000, \$104,679.66 is treated as interest and \$543,892.17 is treated as principal. Both A and B take the payment of interest (\$104,679.66) into account in 2000.

Example 2. Small transaction allocation—(i) Facts. On July 1, 1996, A sells nonpublicly traded property to B for a stated purchase price of \$100,000. The property is not personal use property (within the meaning of section 1275(b)(3)) in the hands of B. Under the loan agreement, B is required to make two installment payments of \$64,857.18, each consisting of \$50,000 of principal and \$14,857.18 of interest. The first payment is due on June 30, 1998, and the second payment is due on June 30, 2000. Both A and B use the cash receipts and disbursements method of accounting and use a calendar year for their taxable year. Assume that the test rate of interest is 9.2 percent, compounded annually.

(ii) *Loan has adequate stated interest.* Under § 1.483-2, the loan has adequate stated interest. Because the loan provides for adequate stated interest and the total amount payable is less than \$250,000, the allocation of principal and interest by A and B is respected even though A and B have allocated less interest to the first installment payment than the amount that has accrued as of the date the payment becomes due (\$19,246.40).

Example 3. Contingent stock payout—(i) Facts. M Corporation and N Corporation each owns one-half of the stock of O Corporation. On December 31, 1994, pursuant to a reorganization qualifying under section 368(a)(1)(B), M contracts to acquire the one-half interest held by N for an initial distribution on that date of 30,000 shares of M voting stock, and a non-assignable right to receive up to 10,000 additional shares of M's voting stock during the next 3 years, provided the net profits of O exceed certain amounts specified in the contract. No interest is provided for in the contract. No additional shares are received in 1995 or in 1996, but in 1997 the annual earnings of O exceed the specified amount and on December 31, 1997, an additional 3,000 M voting shares are transferred to N. Assume that the fair market value of the 3,000 shares on December 31, 1997, is \$300,000.

(ii) *Allocation of unstated interest.* The transfer of the 3,000 M voting shares to N is a deferred payment subject to section 483. Because the contract does not provide for any interest on the payment, a portion of the

shares is treated as unstated interest. The amount of the unstated interest allocable to the shares is an amount equal to the excess of \$300,000 (the fair market value of the shares on the payment date) over the present value of \$300,000, which is determined by discounting the payment at the test rate of interest applicable to the contract from the date of the payment to the date of the exchange. Assume that, under § 1.483-3, the test rate of interest is 10 percent, compounded annually. The amount of unstated interest allocable to the payment of the shares is \$74,605.56 (\$300,000-\$225,394.44).

Par. 4. Sections 1.483-1 through 1.483-5, as proposed on April 8, 1986 (51 FR 12038), are revised to read as follows:

§ 1.483-1 Interest on certain deferred payments.

(a) *Amount constituting interest in certain deferred payment transactions—*

(1) *In general.* Except as provided in paragraph (c) of this section, section 483 applies to a contract for the sale or exchange of property if the contract provides for payments due more than one year after the date of the sale or exchange, and the contract does not provide for adequate stated interest. In general, a contract has adequate stated interest if the contract provides for a stated rate of interest that is at least equal to the test rate (determined under § 1.483-3) and the interest is paid or compounded at least annually. Section 483 may apply to a contract whether the contract is express (written or oral) or implied. For purposes of section 483, "sale or exchange" includes any transaction treated as a sale or exchange for tax purposes. In addition, for purposes of section 483, "property" includes debt instruments and investment units, but does not include U.S. currency, services, or the right to use property. For the treatment of certain payments for the use of property or services, see sections 404 and 467.

(2) *Treatment of contracts to which section 483 applies—(i) Treatment of unstated interest.* If section 483 applies to a contract, unstated interest under the contract is treated as interest for tax purposes. Thus, for example, unstated interest is not treated as part of the amount realized from the sale or exchange of property (in the case of the seller), and is not included in the purchaser's basis in the property acquired in the sale or exchange.

(ii) *Method of accounting for interest on contracts subject to section 483.* Any stated or unstated interest on a contract subject to section 483 is taken into account by a taxpayer under the taxpayer's regular method of accounting (e.g., an accrual method or the cash

receipts and disbursements method). See §§ 1.446-1, 1.451-1, and 1.461-1. For purposes of the preceding sentence, the amount of interest (including unstated interest) allocable to a payment under a contract to which section 483 applies is determined under § 1.446-2(e).

(iii) *Certain transactions between related parties.* For rules relating to the determination of the basis of property in certain transactions between related parties, see § 1.1012-2.

(b) *Definitions—(1) Deferred payments.* For purposes of the regulations under section 483, a deferred payment means any payment that constitutes all or a part of the sales price (as defined in paragraph (b)(2) of this section), and that is due more than six months after the date of the sale or exchange. A payment may be made in the form of cash, stock or securities, or other property (except as provided in section 483(c)(2)).

(2) *Sales price.* For purposes of section 483, the sales price with respect to any sale or exchange is the amount due under the contract (other than stated interest), and the amount of any liability included in the amount realized from the sale or exchange (see § 1.1001-2). Thus, the sales price with respect to any sale or exchange includes any amount of unstated interest under the contract.

(c) *Exceptions to and limitations on the application of section 483—(1) In general.* Sections 483(d), 1274(c)(4), and 1275(b) contain exceptions to and limitations on the application of section 483.

(2) *Sales price of \$3,000 or less.* Section 483(d)(2) applies only if it can be determined at the time of the sale or exchange that the sales price cannot exceed \$3,000, regardless of whether the sales price eventually paid for the property is less than \$3,000.

(3) *Other exceptions and limitations—(i) Certain transfers subject to section 1041.* Section 483 does not apply to any transfer of property subject to section 1041 (relating to transfers of property between spouses or incident to divorce).

(ii) *Treatment of certain obligees.* Section 483 does not apply to an obligee under a contract that—

(A) Is given in consideration for the sale or exchange of property that is personal use property (within the meaning of section 1275(b)(3)) in the hands of the obligor; and

(B) Evidences a below-market gift loan (described in section 7872(c)(1)(A)), a below-market compensation-related loan (described in section 7872(c)(1)(B)), or a below-market corporation-

shareholder loan (described in section 7872(c)(1)(C)).

(iii) *Transactions involving certain demand loans.* Section 483 does not apply to any payment under a contract that evidences a demand loan that is either a gift loan (described in section 7872(c)(1)(A)), a compensation-related loan (described in section 7872(c)(1)(B)), or a corporation-shareholder loan (described in section 7872(c)(1)(C)).

(iv) *Transactions involving certain annuity contracts.* Section 483 does not apply to any payment under an annuity contract described in section 1275(a)(1)(B) (relating to annuity contracts excluded from the definition of debt instrument).

(v) *Options subject to section 1234.* Section 483 does not apply to any payment under an option to buy or sell property.

(d) *Assumptions.* If a debt instrument is assumed, or property is taken subject to a debt instrument, in connection with a sale or exchange of property, the debt instrument is treated for purposes of section 483 in a manner consistent with the rules of § 1.1274-5.

(e) *Aggregation rule.* For purposes of section 483, all sales or exchanges that are part of the same transaction (or a series of related transactions) are treated as a single sale or exchange, and all contracts calling for deferred payments arising from the same transaction (or a series of related transactions) are treated as a single contract. This rule, however, generally only applies to contracts and to sales or exchanges involving a single buyer and a single seller.

§ 1.483-2 Unstated interest.

(a) *In general—(1) Adequate stated interest.* A contract subject to section 483 has unstated interest if the contract does not provide for adequate stated interest. A contract does not provide for adequate stated interest if the sum of the deferred payments exceeds—

(i) The sum of the present values of the deferred payments and the present values of any stated interest payments due under the contract; or

(ii) In the case of a cash method debt instrument (within the meaning of section 1274A(c)(2)) received in exchange for property in a potentially abusive situation (as defined in § 1.1274-3), the fair market value of the property reduced by the fair market value of any consideration other than the debt instrument, and reduced by the sum of all principal payments that are not deferred payments.

(2) *Amount of unstated interest.* For purposes of section 483, the term "unstated interest" means an amount equal to the excess of the sum of the

deferred payments over the amount described in paragraph (a)(1)(i) or (a)(1)(ii) of this section, whichever is applicable.

(b) *Operational rules—(1) In general.* For purposes of paragraph (a) of this section, rules similar to those in paragraphs (c), (d), and (e) of § 1.1274-2 apply to determine whether a contract has adequate stated interest and the amount of unstated interest, if any, on the contract.

(2) *Present value.* For purposes of paragraph (a) of this section, the present value of any deferred payment or interest payment is determined by discounting the payment from the time it becomes due to the date of the sale or exchange at the test rate of interest applicable to the contract in accordance with § 1.483-3.

(c) *Examples.* The provisions of this section are illustrated by the following examples.

Example 1. Contract that does not have adequate stated interest. On January 1, 1994, A sells B nonpublicly traded property under a contract that calls for a \$100,000 payment of principal on January 1, 2004 and 10 interest payments of \$9,000 on January 1 of each year, beginning on January 1, 1995. Assume that the test rate of interest is 9.20 percent, compounded annually. The contract does not provide for adequate stated interest because it does not provide for interest equal to 9.20 percent, compounded annually. The present value of the deferred payments is \$98,727.69. As a result, the contract has unstated interest of \$1,272.31.

Example 2. Contract that does not have adequate stated interest; no interest for initial short period. On May 1, 1996, A sells B nonpublicly traded property under a contract that calls for B to make a principal payment of \$200,000 on December 31, 1998, and semiannual interest payments of \$9,000, payable on June 30 and December 31 of each year, beginning on December 31, 1996. Assume that the test rate of interest is 9 percent, compounded semiannually. Even though the contract calls for a stated rate of interest no lower than the test rate of interests, the contract does not provide for adequate stated interest because the stated rate of interest does not apply for the short period from May 1, 1986, through June 30, 1986.

Example 3. Potentially abusive situation—(i) Facts. Assume that in a potentially abusive situation, a contract for the sale of nonpublicly traded personal property calls for the issuance of a cash method debt instrument (as defined in section 1274A(c)(2)) with a stated principal amount of \$700,000, payable in five years. No other consideration is given. The debt instrument calls for annual payments of interest over its entire term at a rate of 9.20 percent, compounded annually (the test rate of interest applicable to the debt instrument). Thus, the present value of the deferred payment and the interest payments is \$700,000. Assume that the fair market value of the property is \$500,000.

(ii) *Amount of unstated interest.* A cash method debt instrument received in exchange for property in a potentially abusive situation provides for adequate stated interest only if the sum of the deferred payments under the instrument does not exceed the fair market value of the property. Because the deferred payment (\$700,000) exceeds the fair market value of the property (\$500,000), the debt instrument does not provide for adequate stated interest. The debt instrument has unstated interest of \$200,000.

Example 4. Variable rate debt instrument with adequate stated interest; variable rate as of the issue date greater than test rate—(i) Facts. A contract for the sale of nonpublicly traded property calls for the issuance of a debt instrument in the principal amount of \$75,000 due in ten years. The debt instrument calls for interest payable semiannually at a rate of 3 percentage points above the yield on 6-month Treasury bills for the mid-point of the semiannual period immediately preceding the interest payment. Assume that the interest rate is a qualified floating rate and that the debt instrument is a variable rate debt instrument within the meaning of § 1.1275-5.

(ii) *Adequate stated interest.* Under paragraph (b)(1) of this section, the rules of § 1.1274-2(d) apply to determine whether the debt instrument has adequate stated interest. Assume that the test rate of interest applicable to the debt instrument is 9 percent, compounded semiannually, and that the yield on 6-month Treasury bills on the date of the binding written contract for the sale is 8.89 percent. Under § 1.1274-2(d), the debt instrument is tested for adequate stated interest as if it provided for a stated rate of interest of 11.89 percent (3 percent plus 8.89 percent), compounded semiannually, payable over its entire term. Because the test rate of interest is 9 percent, compounded semiannually, and the debt instrument is treated as providing for stated interest of 11.89 percent, compounded semiannually, the debt instrument provides for adequate stated interest.

§ 1.483-3 Test rate of interest applicable to a contract.

(a) *General rule.* Except as provided in paragraph (b) of this section, the test rate of interest for purposes of section 483 is the applicable Federal rate (based on the appropriate compounding period).

(b) *Special rates of interest applicable to certain sales or exchanges—(1) Qualified debt instruments.* In the case of a qualified debt instrument (as defined in section 1274A(b)), the test rate is not greater than 9 percent, compounded semiannually, or an equivalent rate based on an appropriate compounding period.

(2) *Sale-leaseback transactions.* In the case of a sale or exchange of property, all or a portion of which, pursuant to a plan, is leased by the transferor of the property or a person related to the transferor (within the meaning of

sections 267(b) or 707(b)(1)) after the sale or exchange, the test rate is 110 percent of the applicable Federal rate.

(3) *Lower rate for certain sales or exchanges of land between related individuals—(i) Test rate.* In the case of a qualified sale or exchange of land between related individuals (described in section 483(e)), the test rate is not greater than 6 percent, compounded semiannually, or an equivalent rate based on an appropriate compounding period.

(ii) *Special rules.* The following rules and definitions apply in determining whether a sale or exchange is a qualified sale under section 483(e):

(A) *Definition of family members.* The members of an individual's family are determined as of the date of the sale or exchange. The members of an individual's family include those individuals described in section 267(c)(4) and the spouses of those individuals. In addition, for purposes of section 267(c)(4), full effect is given to a legal adoption, "ancestor" means parents and grandparents, and "lineal descendants" means children and grandchildren.

(B) *\$500,000 limitation.* Section 483(e) does not apply to the extent that the stated principal amount of the debt instrument given in the sale or exchange, when added to the aggregate stated principal amount of any other debt instruments to which section 483(e) applies that were issued in prior qualified sales between the same two individuals during the same calendar year, exceeds \$500,000. See *Example 3* of paragraph (b)(3)(iii) of this section.

(C) *Other limitations.* Section 483(e) does not apply if the parties to a contract include persons other than the related individuals and the parties enter into the contract with an intent to circumvent the purposes of section 483(e). In addition, if the property sold or exchanged includes any property other than land, section 483(e) applies only to the extent that the stated principal amount of the debt instrument given in the sale or exchange is attributable to the land (based on the relative fair market values of the property and the land).

(iii) *Examples.* The provisions of this paragraph (b)(3) are illustrated by the following examples.

Example 1. On January 1, 1994, A sells land to B, A's child, for \$650,000. The contract for sale calls for B to make a \$250,000 downpayment and issue a debt instrument with a stated principal amount of \$400,000. The sale is a qualified sale and section 483(e) applies to the debt instrument.

Example 2. The facts are the same as in *Example 1*, except that on June 1, 1994, A

sells additional land to B under a contract that calls for B to issue a debt instrument with a stated principal amount of \$100,000. The stated principal amount of this debt instrument (\$100,000) when added to the stated principal amount of the prior debt instrument (\$400,000) does not exceed \$500,000. Thus, section 483(e) applies to both debt instruments.

Example 3. The facts are the same as in *Example 1*, except that on June 1, 1994, A sells additional land to B under a contract that calls for B to issue a debt instrument with a stated principal amount of \$150,000. The stated principal amount of this debt instrument when added to the stated principal amount of the prior debt instrument exceed \$500,000. Thus, for purposes of section 483(e), the debt instrument issued in the sale of June 1, 1994, is treated as two separate debt instruments: a \$100,000 debt instrument (to which section 483(e) applies) and a \$50,000 debt instrument (to which section 1274, if otherwise applicable, applies).

(c) **Determination of applicable Federal rate.** For purposes of determining the test rate of interest, the applicable Federal rate with respect to a contract is the rate that would apply under § 1.1274-4 if the contract were a debt instrument subject to section 1274.

Par. 5. Section 1.1001-1, paragraph (g), as proposed on April 8, 1986 (51 FR 12046), is revised to read as follows:

§ 1.1001-1 Computation of gain or loss.

(g) **Debt instruments issued in exchange for property.** In the case of any debt instrument issued in exchange for property, the amount realized attributable to the debt instrument is the issue price of the debt instrument as determined under paragraphs (c) or (e) of § 1.1273-2, or § 1.1274-2(b). For purposes of the preceding sentence, if the issue price of a debt instrument is determined under § 1.1273-2(e), the issue price is reduced by the portion of any payments treated as unstated interest (as determined under section 483).

Par. 6. In § 1.1012-1, paragraph (f) is amended by removing the last sentence, and paragraph (g) is added to read as follows:

§ 1.1012-1 Basis of property.

(g) **Debt instruments issued in exchange for property.** In the case of any debt instrument that is issued in exchange for property, the amount of the basis of the property attributable to the debt instrument is the issue price of the debt instrument as determined under paragraphs (c) or (e) of § 1.1273-2, or § 1.1274-2(b). For purposes of the preceding sentence, if the issue price of a debt instrument is determined under

§ 1.1273-2(e), the issue price is reduced by the portion of any payments treated as unstated interest (as determined under section 483).

Par. 7. Sections 1.1271-1 through 1.1275-3, as proposed on April 8, 1986 (51 FR 12048) and further proposed to be amended on September 7, 1989 (54 FR 37125), May 7, 1991 (56 FR 21112) and July 12, 1991 (56 FR 31887), are amended as follows:

1. Sections 1.1271-1 through 1.1275-3 are revised.
2. Section 1.1272-3 is added.
3. The added and revised provisions read as follows:

§ 1.1271-1 Special rules applicable to amounts received on retirement, sale or exchange of debt instruments.

(a) **Intention to call before maturity—**
(1) **In general.** For purposes of section 1271(a)(2), all or a portion of gain realized on a sale or exchange of a debt instrument to which section 1271 applies is treated as ordinary income if there was an intention to call the debt instrument before maturity. "Intention to call a debt instrument before maturity" means a written or oral agreement or understanding not provided for in the debt instrument between the issuer and the original holder of the debt instrument that the issuer will redeem the debt instrument before maturity. In the case of debt instruments that are part of an issue, the agreement or understanding must be between the issuer and the original holders of a substantial amount of the debt instruments in the issue. An intention to call before maturity can exist even if the intention is conditional (e.g., the issuer's decision to call depends on the financial condition of the issuer on the potential call date) or is not legally binding. For purposes of this section, "original holder" means the first holder (other than an underwriter or dealer that purchased the debt instrument for resale in the ordinary course of its trade or business).

(2) **Exceptions.** In addition to the exceptions provided in sections 1271(a)(2)(B) and 1271(b), section 1271(a)(2) does not apply to—

- (i) A debt instrument that is publicly offered (as defined in § 1.1273-2(a)(2)); or
- (ii) A debt instrument to which section 1272(a)(6) applies (relating to certain interests in or mortgages held by a REMIC, and certain other debt instruments with payments subject to acceleration).

(b) **Short-term obligations—**(1) **In general.** Under sections 1271(a)(3) and (a)(4), all or a portion of the gain realized on the sale or exchange of a

short-term government or nongovernment obligation is treated as ordinary interest income. Sections 1271(a)(3) and (a)(4), however, do not apply to any short-term obligation subject to section 1281.

(2) **Method of making elections.** Elections to accrue on a constant yield basis under sections 1271(a)(3)(E) and (a)(4)(D) are made on an obligation by obligation basis by reporting the transaction on the basis of daily compounding on the taxpayer's timely filed Federal income tax return for the year of the sale or exchange. These elections are irrevocable.

(3) **Counting conventions.** In computing the ratable share of acquisition discount under section 1271(a)(3) or OID under section 1271(a)(4), any reasonable counting convention may be used (e.g., 30 days per month/360 days per year).

§ 1.1272-1 Current Inclusion in Income of OID.

(a) **Overview—**(1) **In general.** Under section 1272(a)(1), a holder of a debt instrument includes accrued OID in gross income (as interest), regardless of the holder's regular method of accounting. A holder includes qualified stated interest (as defined in § 1.1273-1(c)) in income under the holder's regular method of accounting. See §§ 1.446-2 and 1.451-1.

(2) **Debt instruments not subject to OID inclusion rules.** Sections 1272(a)(2) and 1272(c) list exceptions to the general inclusion rule of section 1272(a)(1). For purposes of section 1272(a)(2)(E) (relating to certain loans between natural persons), "loan" does not include a stripped bond or stripped coupon within the meaning of section 1286(e), and the rule in section 1272(a)(2)(E)(iii), which treats a husband and wife as one person, does not apply to loans made between a husband and wife.

(b) **Accrual of OID—**(1) **Constant yield method.** Except as provided in paragraph (b)(2) of this section, the amount of OID includible in the income of a holder of a debt instrument for any taxable year is determined using the constant yield method as described under this paragraph (b)(1).

(i) **Step one: Determine the debt instrument's yield to maturity.** The "yield to maturity" or "yield" of a debt instrument is the discount rate that, when used in computing the present value of all principal and interest payments to be made under the debt instrument, produces an amount equal to the issue price of the debt instrument. The yield must be constant over the term of the debt instrument and, when

expressed as a percentage, must be calculated to at least two decimal places. See paragraph (d) of this section for rules relating to the yield of certain debt instruments subject to contingencies.

(ii) *Step two: Determine the accrual periods.* An accrual period is an interval of time with respect to which the accrual of OID is measured. Accrual periods may be of any length and may vary in length over the term of the debt instrument, provided that each accrual period is no longer than one year and each scheduled payment of principal or interest occurs at the end of an accrual period. In general, the computation of OID is simplest if accrual periods correspond to the intervals between payment dates provided by the terms of the debt instrument. In computing the length of accrual periods, any reasonable counting convention may be used (e.g., 30 days per month/360 days per year).

(iii) *Step three: Determine the OID allocable to each accrual period.* Except as provided in paragraph (c) of this section, the OID allocable to an accrual period equals the product of the adjusted issue price of the debt instrument (as defined in § 1.1275-1(b)) at the beginning of the accrual period and the yield of the debt instrument, less the amount of any qualified stated interest allocable to the accrual period. In performing this calculation, the yield must be stated appropriately taking into account the length of the particular accrual period. *Example 1* in paragraph (j) of this section provides a formula for converting a yield based upon an accrual period of one length to an equivalent yield based upon an accrual period of a different length.

(iv) *Step four: Determine the daily portions of OID.* The daily portion of OID is determined by allocating to each day in an accrual period the ratable portion of the OID allocable to the accrual period. The holder of the debt instrument includes in income the daily portions of OID for each day during the taxable year on which the holder held the debt instrument.

(2) *Exceptions and modifications—(i)* The rules of paragraph (b)(1) of this section do not apply to—

(A) A debt instrument to which section 1272(a)(6) applies (certain interests in or mortgages held by a REMIC, and certain other debt instruments with payments subject to acceleration);

(B) A debt instrument to which § 1.1275-4 applies (debt instruments with contingent payments), except as provided in § 1.1275-4; or

(C) A variable rate debt instrument to which § 1.1275-5 applies, except as provided in § 1.1275-5.

(ii) The amount of OID includible in income by a holder is adjusted for any acquisition premium or is eliminated in the case of a debt instrument purchased at a premium. See sections 1272(a)(7) and 1272(c) and § 1.1272-2.

(c) *Special rules for determining the OID allocable to an accrual period—(1) Unpaid qualified stated interest allocable to an accrual period.* In determining the OID allocable to an accrual period under paragraph (b)(1)(iii) of this section, if an interval between payments of qualified stated interest contains more than one accrual period—

(i) The amount of qualified stated interest payable at the end of the interval is allocated on a pro rata basis to each accrual period in the interval; and

(ii) The adjusted issue price must be increased by the amount of any qualified stated interest that has accrued prior to the beginning of the accrual period but is not payable until a later date. See *Example 2* of paragraph (j) of this section for an example illustrating the rules in this paragraph (c)(1).

(2) *Special rule for final accrual periods.* The OID allocable to the final accrual period is the difference between the amount payable at maturity (other than a payment of qualified stated interest) and the adjusted issue price at the beginning of the final accrual period.

(3) *Special rule for certain instruments with an initial short accrual period.* If all accrual periods are of equal length, except for an initial shorter accrual period, the amount of OID allocable to the initial accrual period may be computed using any reasonable method. See *Example 3* in paragraph (j) of this section.

(4) *Cross-reference.* See § 1.1272-3 for an election by an accrual method holder to treat all interest income (including any market discount, acquisition discount, or qualified stated interest) on a debt instrument as OID.

(d) *Yield and maturity of certain debt instruments subject to contingencies—*

(1) *In general.* The yield and maturity of a debt instrument are determined by assuming that payments will be made according to the instrument's stated payment schedule, even if the debt instrument provides for a contingency that could result in the acceleration or deferral of one or more payments.

However, the rule in the preceding sentence only applies if, as of the issue date, the amounts payable upon the occurrence of the contingency are fixed.

See § 1.1275-4 for the treatment of a debt instrument with payments contingent as to amount.

(2) *Contingencies that are likely to occur—(i) Contingency taken into account.* Notwithstanding the rule in paragraph (d)(1) of this section, if, based on all the facts and circumstances as of the issue date, it is more likely than not that the contingency will occur, then the yield and maturity of the debt instrument are computed by assuming that the contingency will occur.

(ii) *Mandatory sinking fund provision.* Paragraph (d)(2)(i) of this section does not apply to a mandatory sinking fund provision if the terms of the provision meet reasonable commercial standards.

(iii) *Consistency rule.* The determination by the issuer that a contingency will or will not occur under paragraph (d)(2)(i) of this section is binding on all holders of the debt instrument. However, the issuer's determination is not binding on a holder that explicitly discloses that its determination of the yield and maturity of the instrument is different from the issuer's determination. The disclosure must be made on the form prescribed by the Commissioner and attached to the holder's timely filed Federal income tax return for the tax year that includes the acquisition date of the debt instrument.

(3) *Treatment of options.* Notwithstanding paragraphs (d)(1) and (d)(2) of this section, this paragraph (d)(3) provides rules for determining the yield and maturity of a debt instrument that provides the holder or issuer with unconditional options to accelerate or defer payments on one or more dates during the term of the debt instrument if, as of the issue date, the amounts payable upon the exercise of the options are fixed. For purposes of calculating yield and maturity, an issuer is treated as exercising any such option if its exercise would lower the yield of the debt instrument. A holder is treated as exercising any such option if its exercise would increase the yield of the debt instrument. See *Example 5* through *Example 7* in paragraph (j) of this section.

(4) *Subsequent adjustments.* If a contingency described in this paragraph (d) (including the exercise of an option described in paragraph (d)(3) of this section) actually occurs or does not occur, contrary to the assumption made pursuant to this paragraph (d) (a "change in circumstances"), the debt instrument is treated as follows—

(i) If the change in circumstances defers a payment (e.g., failure to exercise a put or call option treated as exercised, or exercise of an option to extend treated as not exercised), then,

solely for purposes of sections 1272 and 1273, the debt instrument is treated as reissued on the date of exercise or non-exercise for an amount equal to its adjusted issue price on that date. See *Example 5* in paragraph (j) of this section.

(ii) If the change in circumstances accelerates a payment (e.g., failure to exercise an option to extend or to issue additional debt instruments in lieu of cash interest payments treated as exercised, or exercise of a put or call option treated as not exercised), the debt instrument is treated as if the issuer made a prepayment in the amount of the accelerated payment. See section 1271 and the regulations thereunder if the debt instrument is retired or § 1.1275-2(a) in all other cases. See *Example 6* and *Example 7* in paragraph (j) of this section.

(5) *Certain debt instruments with indefinite maturities.* The yield of a debt instrument payable on demand or with an indefinite maturity is its stated interest rate if its issue price is equal to its stated principal amount and interest is paid or compounded at a fixed rate over the entire term of the debt instrument at intervals of one year or less.

(e) *Convertible debt instruments.* For purposes of section 1272, an option to convert a debt instrument into the stock of the issuer or a related party (as defined in section 267(b) or section 707(b)(1)) is ignored, even if the privilege may be satisfied or exercised for the cash value of the stock.

(f) *Special rules for determining whether a debt instrument is a short-term obligation.* For purposes of sections 871(g), 1271(a)(3), 1271(a)(4), 1272(a)(2)(C), and 1283(a)(1), the term of a debt instrument is the longest length of time possible that the instrument could be outstanding under the terms of the debt instrument. In addition, the term of the instrument includes either the issue date or the maturity date, but not both dates.

(g) *Basis adjustment.* The basis of a debt instrument in the hands of the holder is increased by the amount of OID included in the holder's gross income and decreased by the amount of any payment from the issuer to the holder under the debt instrument other than a payment of qualified stated interest.

(h) *Debt instruments denominated in a currency other than the U.S. dollar.* The rules of section 1272 and this section apply to debt instruments that provide for payments denominated in, or determined by reference to, the functional currency of the taxpayer or qualified business unit of the taxpayer

(even if that currency is other than the U.S. dollar). See § 1.988-2(b) to determine interest income or expense for debt instruments that provide for payments denominated in, or determined by reference to, a nonfunctional currency.

(i) *[Reserved]*

(j) *Examples.* The rules of this section are illustrated by the following examples. Each example assumes that all taxpayers use the calendar year as the taxable year. In addition, each example assumes a 30-day month, 360-day year, and that the first accrual period begins on the issue date and the final accrual period ends on the day before the stated maturity date. Although, for purposes of simplicity, the yield as stated is rounded to two decimal places, the computations do not reflect any such rounding convention.

Example 1. Accrual of OID on zero coupon debt instrument; choice of accrual periods—

(i) *Facts.* On July 1, 1994, A purchases at original issue, for \$675,564.17, a debt instrument that matures on July 1, 1999, and provides for a single payment of \$1,000,000 at maturity.

(ii) *Determination of yield.* Under paragraph (b)(1)(i) of this section, the yield of the debt instrument is eight percent, compounded semiannually.

(iii) *Determination of accrual period.* Under paragraph (b)(1)(ii) of this section, accrual periods may be of any length, provided that each accrual period is no longer than one year and each payment of principal or interest occurs at the end of an accrual period. The yield to maturity to be used in computing OID accruals in any accrual period, however, must reflect the length of the accrual period chosen. A yield based on compounding b times per year is equivalent to a yield based on compounding c times per year as indicated by the following formula:

$$r = c \left\{ (1+i/b)^{b/c} - 1 \right\}$$

In which:

i = The yield based on compounding b times per year expressed as a decimal

r = The equivalent yield based on compounding c times per year expressed as a decimal

b = The number of compounding periods in a year on which i is based (for example, 12, if i is based on monthly compounding)

c = The number of compounding periods in a year on which r is based

(iv) *Determination of OID allocable to each accrual period.* Assume that A decides to compute OID on the debt instrument using semiannual accrual periods. Under paragraph (b)(1)(iii) of this section, the OID allocable to the first accrual period is \$27,022.56: the product of the issue price (\$675,564.17) and the yield properly adjusted for the length of the accrual period (eight percent/2), less qualified stated interest allocable to the accrual period (\$0). The daily portion of OID for the first semiannual accrual period is \$150.13 (\$27,022.56/180).

(v) *Determination of OID if monthly accrual periods are used.* Alternatively, assume that A decides to compute OID on the debt instrument using monthly accrual periods. Using the above formula, the yield on the debt instrument reflecting monthly compounding is 7.87 percent, compounded monthly ($12 \left\{ (1+.08/2)^{2/12} - 1 \right\}$). Under paragraph (b)(1)(iii) of this section, the OID allocable to the first accrual period is \$4,430.48: the product of the issue price (\$675,564.17) and the yield properly adjusted for the length of the accrual period (7.87 percent/12), less qualified stated interest allocable to the accrual period (\$0). The daily portion of OID for the first monthly accrual period is \$147.68 (\$4,430.48/30).

Example 2. Accrual of OID on debt instrument with qualified stated interest—(i) Facts. On September 1, 1994, A purchases at original issue, for \$90,000, B corporation's debt instrument that matures on September 1, 2004, and has a stated principal amount of \$100,000, payable on that date. The debt instrument provides for semiannual payments of interest of \$3,000, payable on September 1 and March 1 of each year, beginning on March 1, 1995.

(ii) *Determination of yield.* The debt instrument is a ten-year debt instrument with an issue price of \$90,000 and a stated redemption price at maturity of \$100,000. The semiannual payments of \$3,000 are qualified stated interest payments. Under paragraph (b)(1)(i) of this section, the yield is 7.44 percent, compounded semiannually.

(iii) *Accrual of OID if semiannual accrual periods are used.* Assume that A decides to compute OID on the debt instrument using semiannual accrual periods. Under paragraph (b)(1)(iii) of this section, the OID allocable to the first accrual period equals the product of the issue price (\$90,000) and the yield properly adjusted for the length of the accrual period (7.44 percent/2), less qualified stated interest allocable to the accrual period (\$3,000). Therefore, the amount of OID for the accrual period equals \$345.78 (\$3,345.78-\$3,000).

(iv) *Adjustment for accrued but unpaid qualified stated interest if monthly accrual periods are used.* Assume, alternatively, that A decides to compute OID on the debt instrument using monthly accrual periods. The yield, compounded monthly, is 7.32 percent. Under paragraph (b)(1)(iii) of this section, the OID allocable to the first accrual period equals the product of the issue price (\$90,000) and the yield properly adjusted for the length of the accrual period (7.32 percent/12), less qualified stated interest allocable to the accrual period. Under paragraph (c)(1)(i) of this section, the qualified stated interest allocable to the accrual period is the pro rata amount of qualified stated interest allocable to the accrual period (\$3,000 × 1/6, or \$500). Therefore, the amount of OID for the accrual period is \$49.18 (\$549.18-\$500).

Example 3. Accrual of OID for debt instrument with short first accrual period—

(i) *Facts.* On May 1, 1994, G purchases at original issue, for \$80,000, H corporation's debt instrument maturing on July 1, 2004. The debt instrument provides for a single payment at maturity of \$250,000. G computes

its OID assuming six-month accrual periods ending on January 1 and July 1 of each year and an initial short two-month accrual period from May 1, 1994 through June 30, 1994.

(ii) *Determination of yield.* The yield on the debt instrument is 11.53 percent, compounded semiannually.

(iii) *Determination of OID allocable to short first accrual period.* Under paragraph (c)(3) of this section, G may use any reasonable method to compute OID for the initial accrual period. One reasonable method is to calculate the amount of OID pursuant to the following formula:

$$\text{OID}_{\text{short}} = \text{IP} \times (i/k) \times f$$

In which:

$\text{OID}_{\text{short}}$ = The amount of OID allocable to the initial short accrual period

IP = The issue price of the debt instrument

i = The yield to maturity expressed as a decimal

k = The number of accrual periods in a year

f = A fraction whose numerator is the number of days in the short first accrual period, and whose denominator is the number of days in a full accrual period

(iv) *Amount of OID for the short period.* Under this method, the amount of OID for the initial short accrual period equals \$1,537 (\$80,000 \times (11.53 percent/2) \times (60/180)).

(v) *Alternative method.* Another reasonable method is to calculate the amount of OID for the initial short period using the yield based on bi-monthly compounding, computed pursuant to the formula set forth in *Example 1* of paragraph (j) of this section. Under this method, the amount of OID for the initial short period equals \$1,508.38 (\$80,000 \times (11.31 percent/6)).

Example 4. Impermissible accrual of OID using a method other than constant yield method—(i) Facts. On July 1, 1994, B purchases at original issue, for \$100,000, C corporation's debt instrument that matures on July 1, 1999, and has a stated principal amount of \$100,000. The debt instrument provides for a single payment at maturity of \$148,024.43. The yield of the debt instrument is eight percent, compounded semiannually.

(ii) *Determination of yield.* Assume that C uses six monthly accrual periods to compute its OID for 1994. The yield must reflect the monthly compounding (as determined using the formula described in *Example 1* of paragraph (j) of this section). As a result, the monthly yield of the debt instrument is 7.87 percent, divided by 12. C may not compute its monthly accruals of OID for the last six months in 1994 by dividing eight percent by 12.

Example 5. Debt instrument subject to put option—(i) Facts. On January 1, 1994, G purchases at original issue, for \$70,000, H corporation's debt instrument maturing on January 1, 2009, with a stated principal amount of \$100,000, payable at maturity. The debt instrument provides for semiannual payments of interest of \$4,000, payable on January 1 and July 1 of each year, beginning on July 1, 1994. The debt instrument gives G a right to put the bond back to H, exercisable on January 1, 2004, in return for \$85,000 (exclusive of the \$4,000 of stated interest payable on that date).

(ii) *Determination of yield and maturity.* Yield determined without regard to the put

option is 12.47 percent, compounded semiannually. Yield determined by assuming that the put option is exercised (*i.e.*, by using January 1, 2004, as the maturity date and \$85,000 as the stated principal amount payable on that date) is 12.56 percent, compounded semiannually. Thus, under paragraph (d)(3) of this section, it is assumed that G will exercise the put option, because exercise of the option would increase the yield of the debt instrument. Thus, for purposes of calculating OID, the debt instrument is assumed to be a ten-year debt instrument with an issue price of \$70,000, a stated redemption price at maturity of \$85,000, and a yield of 12.56 percent, compounded semiannually.

(iii) *Consequences if put option is, in fact, not exercised.* If the put option is, in fact, not exercised, then, under paragraph (d)(4)(i) of this section, the debt instrument is treated, solely for purposes of sections 1272 and 1273, as if it were reissued on January 1, 2004 for an amount equal to its adjusted issue price on that date, \$85,000. The new debt instrument matures on January 1, 2009, with a stated principal amount of \$100,000 payable on that date and provides for semiannual payments of interest of \$4,000. The yield of the new debt instrument is 12.08 percent, compounded semiannually.

Example 6. Debt instrument subject to partial call option—(i) Facts. On January 1, 1994, H purchases at original issue, for \$95,000, J corporation's debt instrument that matures on January 1, 1999, and has a stated principal amount of \$100,000, payable on that date. The debt instrument provides for semiannual payments of interest of \$4,000, payable on January 1 and July 1 of each year, beginning on July 1, 1994. On January 1, 1997, J has a right to call 50 percent of the principal amount of the debt instrument for \$55,000 (exclusive of the \$4,000 of stated interest payable on that date).

(ii) *Determination of yield and maturity.* Yield determined without regard to the call option is 9.27 percent, compounded semiannually. Yield determined by assuming J exercises its call option is 10.75 percent, compounded semiannually. Thus, under paragraph (d)(3) of this section, it is assumed that J will not exercise the call option because exercise of the option would increase the yield of the debt instrument. Thus, for purposes of calculating OID, the debt instrument is assumed to be a five-year debt instrument with a single principal payment at maturity of \$100,000, and a yield of 9.27 percent, compounded semiannually.

(iii) *Consequences if the call option is, in fact, exercised.* If the call option is, in fact, exercised, then under paragraph (d)(4)(ii) of this section, the debt instrument is treated as if the issuer made a prepayment of \$55,000 that is subject to § 1.1275-2(a). Consequently, under § 1.1275-1(b), the adjusted issue price immediately after the call option is exercised equals the issue price of the debt instrument (\$95,000) increased by the OID previously includable in gross income (\$2,725.12) and decreased by any payment (other than a qualified stated interest payment) (\$55,000). The yield of the debt instrument continues to be 9.27 percent, compounded semiannually. Under paragraph (c)(2) of this section, the

OID for the final accrual period is \$7,357.23 (the difference between the amount payable at maturity and the adjusted issue price at the beginning of the final accrual period).

Example 7. Debt instrument providing for payment of interest "in kind"—(i) Facts. On January 1, 1994, T purchases at original issue, for \$75,000, U corporation's debt instrument maturing on January 1, 1999, at a stated principal amount of \$100,000, payable on that date. The debt instrument provides for semiannual payments of interest of \$2,000 on January 1 and July 1 of each year, beginning on July 1, 1994. The debt instrument gives U the right to issue, in lieu of the first interest payment, a second debt instrument maturing on January 1, 1999 with a stated principal amount of \$2,000. This debt instrument would provide for semiannual payments of interest of \$40 on January 1 and July 1 of each year, beginning on January 1, 1995.

(ii) *Determination of yield and maturity.* Under § 1.1275-2(c)(3), the issuance of the subsequent debt instrument is not considered a payment made on the original debt instrument, and the subsequent debt instrument is aggregated with the original debt instrument. As a result, the right to issue the subsequent debt instrument is treated as an option to defer the initial interest payment until maturity. Yield determined without regard to the option to defer is 10.41 percent, compounded semiannually. Yield determined by assuming U exercises its option to defer is 10.28 percent, compounded semiannually. Thus, under paragraph (d)(3) of this section, it is assumed that U will exercise the option to defer by issuing the subsequent debt instrument because exercise of the option would decrease the yield of the debt instrument. For purposes of calculating OID, the debt instrument is assumed to be a five-year debt instrument with a single principal payment at maturity of \$102,000 and nine semiannual interest payments of \$2,040 beginning on January 1, 1995. As a result, the yield is 10.28 percent, compounded semiannually.

(iii) *Consequences if the initial interest payment is made.* Under paragraph (d)(4)(ii) of this section, if U pays \$2,000 on July 1, 1994, the debt instrument is treated as if the issuer made a prepayment of \$2,000. Consequently, the adjusted issue price of the debt instrument immediately after the prepayment is \$77,380.22. The yield continues to be 10.28 percent, compounded semiannually. Under paragraph (c)(2) of this section, the OID for the final accrual period of six months is \$4,255.56 (the difference between the amount payable at maturity and the adjusted issue price at the beginning of the final accrual period).

Example 8. Debt instrument with stepped interest rate—(i) Facts. On July 1, 1994, G purchases at original issue, for \$85,000, H corporation's debt instrument maturing on July 1, 2004. The debt instrument has a stated principal amount of \$100,000, payable on the maturity date and provides for semiannual interest payments on January 1 and July 1 of each year, beginning on January 1, 1995. For the first five years, the amount of each payment is \$2,000 and for the final five years the amount of each payment is \$5,000.

(ii) *Determination of OID.* Assume that G computes its OID using six-month accrual periods ending on January 1 and July 1 of each year. The yield of the debt instrument, determined under paragraph (b)(1)(i) of this section, is 8.65 percent, compounded semiannually. Interest is unconditionally payable at a fixed rate of at least four percent, compounded semiannually, for the entire term of the debt instrument. Consequently, under § 1.1273-1(c)(1), the semiannual payments are qualified stated interest payments to the extent of \$2,000. The amount of OID for the first six-month accrual period is \$1,674.34 (the issue price of the debt instrument (\$85,000) times the yield of the debt instrument for that accrual period (.0865/2) less the amount of any qualified stated interest allocable to that accrual period (\$2,000)).

Example 9. Debt instrument with an indefinite maturity that provides for interest at a constant rate—(i) Facts. On January 1, 1994, V purchases at original issue, for \$100,000, W corporation's debt instrument. The debt instrument calls for interest to accrue at a rate of nine percent, compounded annually. The debt instrument is redeemable at any time at the option of the holder for an amount equal to \$100,000, plus accrued interest.

(ii) *Amount of OID.* Pursuant to paragraph (d)(5) of this section, the yield of the debt instrument is nine percent, compounded annually. If the debt instrument is not redeemed during 1994, the amount of OID allocable to the year is \$9,000.

§ 1.1272-2 Treatment of debt instruments purchased at a premium.

(a) *In general.* Under section 1272(c)(1), if a holder purchases a debt instrument at a premium, the holder does not include any OID in gross income. Under section 1272(a)(7), if a holder purchases a debt instrument at an acquisition premium, the holder reduces the amount of OID includible in gross income by the fraction determined under paragraph (b)(4) of this section.

(b) *Definitions and special rules—(1) Purchase.* For purposes of section 1272 and this section, "purchase" means any acquisition of a debt instrument, including the acquisition of a newly issued debt instrument in a debt-for-debt exchange or the acquisition of a debt instrument in a transferred basis transaction (e.g., under section 362 (a) or (b) or section 1015).

(2) *Premium.* A debt instrument is purchased at a premium if its adjusted basis, immediately after its purchase by the holder, exceeds the sum of all amounts payable on the instrument after the purchase date other than payments of qualified stated interest (as defined in § 1.1273-1(c)).

(3) *Acquisition premium.* A debt instrument is purchased at an acquisition premium if it is not purchased at a premium and immediately after its purchase

(including a purchase at original issue) its adjusted basis is greater than its adjusted issue price (as defined in § 1.1275-1(b)).

(4) *Acquisition premium fraction.* In applying section 1272(a)(7), the cost of a debt instrument is its adjusted basis immediately after its acquisition by the purchaser. Thus, the numerator of the fraction determined under section 1272(a)(7)(B) is the excess of the adjusted basis of the debt instrument immediately after its acquisition by the purchaser over the adjusted issue price of the debt instrument. The denominator of the fraction determined under section 1272(a)(7)(B) is the excess of the sum of all amounts payable on the debt instrument after the purchase date, other than payments of qualified stated interest, over the instrument's adjusted issue price.

(5) *Election to accrue discount on a constant yield basis.* Rather than apply the acquisition premium fraction, a holder of a debt instrument purchased at an acquisition premium may elect under § 1.1272-3 to compute OID accruals by treating the purchase as a purchase at original issuance and applying the mechanics of the constant yield method.

(6) *Special rules for determining basis—(i) Debt instruments acquired in exchange for other property.* For purposes of section 1272(a)(7), section 1272(c), and this section, if a debt instrument is acquired in an exchange for other property (other than in a reorganization defined in section 368) and the basis of the debt instrument is determined, in whole or in part, by reference to the basis of the other property, the basis of the debt instrument will not exceed its fair market value immediately after the exchange. For example, if a debt instrument is distributed from a partnership to a partner and the distribution is subject to section 731, the partner's basis in the debt instrument may not exceed its fair market value for purposes of this section.

(ii) *Purchases of debt instruments with accrued but unpaid qualified stated interest.* For purposes of this section, if the adjusted basis of a debt instrument immediately after its purchase is equal to the cost of the instrument under section 1012, the adjusted basis is reduced by any amount of qualified stated interest that is accrued but unpaid as of the purchase date.

(iii) *Acquisition by gift.* For purposes of this section, a donee's adjusted basis in a debt instrument is the donee's basis for determining gain under section 1015(a).

(c) *Examples.* The following examples illustrate the application of this section.

Example 1. Debt instrument purchased at an acquisition premium—(i) Facts. On July 1, 1992, A purchased at original issue, for \$500, a debt instrument issued by Corporation X. The debt instrument matures on July 1, 1997, and calls for a single payment at maturity of \$1,000. Under section 1273(a), the debt instrument has a stated redemption price at maturity of \$1,000 and, thus, OID of \$500. On July 1, 1994, when the debt instrument's adjusted issue price is \$659.75, A sells the debt instrument to B for \$750 in cash.

(ii) *Acquisition premium fraction.* Because the cost to B of the debt instrument is less than the amount payable on the debt instrument after the purchase date, but is greater than the debt instrument's adjusted issue price, B has paid an acquisition premium for the debt instrument. Accordingly, the daily portion of OID for any day that B holds the debt instrument is reduced by a fraction the numerator of which is \$90.25 (the excess of the cost of the debt instrument over its adjusted issue price), and the denominator of which is \$340.25 (the excess of the sum of all payments after the purchase date over its adjusted issue price).

Example 2. Debt-for-debt exchange where holder is considered to purchase new debt instrument at a premium—(i) Facts. On January 1, 1994, H purchases at original issue, for \$1,000, a debt instrument issued by Corporation X. On July 1, 1996, when H's adjustable basis in the debt instrument is \$1,000, Corporation X issues a new debt instrument with a stated redemption price at maturity of \$750 to H in exchange for the old debt instrument. Assume that the issue price of the new debt instrument is \$600. Thus, under section 1273(a), the debt instrument has OID of \$150. The exchange qualifies as a recapitalization under section 368(a)(1)(E) with the consequence that, under sections 354 and 358, H recognizes no loss on the exchange and has an adjusted basis in the new debt instrument of \$1,000.

(ii) *Application of section 1272(c)(1).* Under paragraphs (b)(1) and (b)(2) of this section, H purchases the new debt instrument at a premium of \$250. Accordingly, under section 1272(c)(1), H is not required to include OID in income with respect to the new debt instrument.

Example 3. Debt-for-debt exchange where holder is considered to purchase new debt instrument at an acquisition premium—(i) Facts. The facts are the same as in Example 2, except that H purchases the old debt instrument from another holder on July 1, 1994, and on July 1, 1996, H's adjusted basis in the old debt instrument is \$700. Under section 1273(a), the new debt instrument is issued with OID of \$150.

(ii) *Application of section 1272(a)(7).* Under paragraphs (b)(1) and (b)(3) of this section, H purchases the new debt instrument at an acquisition premium of \$100. Accordingly, the daily portion of OID that is includible in H's income is reduced by the daily portion of acquisition premium determined under section 1272(a)(7).

Example 4. Treatment of acquisition premium for debt instrument acquired by gift—(i) Facts. On July 1, 1994, D receives as

a gift a debt instrument with a stated redemption price at maturity of \$1,000 and an adjusted issue price of \$800. The fair market value of the debt instrument on that date is \$900. The donor purchased the debt instrument on July 1, 1993 at an acquisition premium and had an adjusted basis of \$950 in the debt instrument.

(ii) *Application of section 1272(a)(7).* Under paragraphs (b)(1), (b)(3) and (b)(6)(iii) of this section, D is considered to have purchased the debt instrument at an acquisition premium of \$150. Accordingly, the daily portion of OID that is includible in D's income is reduced by the daily portion of acquisition premium determined under section 1272(a)(7).

§ 1.272-3 Election by accrual method holder to treat all interest on a debt instrument as OID.

(a) *Election.* A holder that uses an accrual method of accounting may elect to include in gross income all interest that accrues on a debt instrument by using the constant yield method described in paragraph (c) of this section. For purposes of this election, interest includes stated interest, acquisition discount, OID, de minimis OID, market discount, de minimis market discount, and unstated interest, as adjusted by any amortizable bond premium or acquisition premium.

(b) *Scope of election—(1) In general.* Except as provided in paragraph (b)(2) of this section, a holder may make the election for any debt instrument.

(2) *Exceptions, limitations, and special rules—(i) Debt instruments with amortizable bond premium (as determined under section 171).* (A) A holder may make the election for a debt instrument with amortizable bond premium only if the instrument qualifies under section 171(d).

(B) If a holder makes an election under this section for a debt instrument with amortizable bond premium, the holder is deemed to have made the election under section 171(c)(2) for all of the holder's other debt instruments with amortizable bond premium. If the holder has previously made the election under section 171(c)(2), the requirements of that election with respect to any debt instrument are satisfied by electing to amortize the bond premium under the rules provided by this section.

(ii) *Tax-exempt debt instruments.* A holder may not make the election for a tax-exempt obligation as defined in section 1275(a)(3).

(iii) *Market discount debt instruments.* If a holder makes the election under this section for a debt instrument with market discount, the holder is deemed to have made the election under section 1278(b) for all of the holder's other debt instruments with

market discount. If the holder has previously made the election under section 1278(b), the requirements of that election with respect to any debt instrument are satisfied by electing to include the market discount in income in accordance with the rules provided by this section.

(c) *Mechanics of the constant yield method—(1) In general.* For purposes of this section, the amount of interest that accrues during an accrual period is determined under rules similar to those under section 1272 (the constant yield method). In applying the constant yield method, however, a debt instrument subject to the election is treated as if—

(i) The instrument is issued for the holder's adjusted basis immediately after its acquisition by the holder;

(ii) The instrument is issued on the holder's acquisition date; and

(iii) None of the interest payments provided for in the instrument are qualified stated interest payments.

(2) *Special rules to determine adjusted basis.* For purposes of paragraph (c)(1)(i) of this section—

(i) If the debt instrument is acquired in an exchange for other property (other than in a reorganization defined in section 368) and the basis of the debt instrument is determined, in whole or in part, by reference to the basis of the other property, the adjusted basis of the debt instrument may not exceed its fair market value immediately after the exchange; and

(ii) If the debt instrument was acquired with amortizable bond premium (as determined under section 171), the adjusted basis of the debt instrument is reduced by the value attributable to any conversion feature, unless that amount is de minimis.

(d) *Basis adjustments.* The holder's basis in each debt instrument is adjusted for amounts taken into account by the holder under this section.

(e) *Time and manner of making the election.* The election must be made for the taxable year in which the holder acquires the debt instrument. The election is made by attaching to the holder's timely filed Federal income tax return a statement that the holder is making an election under this paragraph and that identifies the debt instruments subject to the election. A holder may make the election for a class or group of debt instruments by attaching a statement describing the type or types of debt instruments being designated for the election. If applicable, this election satisfies the election requirements under sections 171(c)(2), 1276(b)(2), 1278(b), and 1283(b)(2).

(f) *Revocation of election.* The election may not be revoked unless

approved by the Commissioner. However, the holder will still be required to use the constant yield method to compute accrued market discount and acquisition discount for debt instruments that were acquired on or before the revocation and that were subject to the election.

§ 1.1273-1 Definition of OID.

(a) *In general.* Section 1273(a)(1) defines OID as the excess of a debt instrument's stated redemption price at maturity over its issue price. Section 1.1273-2 defines issue price and paragraphs (b) and (c) of this section define stated redemption price at maturity. Paragraph (d) of this section provides de minimis rules under which the amount of OID is treated as zero. Although the total amount of OID with respect to a debt instrument with an indefinite maturity date (including an instrument payable on demand) may be indeterminate, § 1.1272-1(d)(5) provides rules to determine the yield of certain debt instruments with indefinite maturities. See Example 9 in § 1.1272-1(j).

(b) *Stated redemption price at maturity.* A debt instrument's stated redemption price at maturity is the sum of all payments provided by the debt instrument other than qualified stated interest payments. The rules of § 1.1272-1(d) apply in determining the stated redemption price at maturity of certain debt instruments subject to contingencies.

(c) *Qualified stated interest—(1) In general.* "Qualified stated interest" is stated interest that is unconditionally payable in cash or in property (other than debt instruments of the issuer) at least annually at a single fixed rate. Interest is payable at a single fixed rate only if the rate appropriately takes into account the length of the interval between payments. See Example 1 in paragraph (f) of this section. Interest is considered to be unconditionally payable only if late payment or nonpayment is penalized or reasonable remedies exist to compel payment. Notwithstanding the preceding sentence, interest is not considered to be unconditionally payable if the lending transaction does not reflect arm's length dealing and the holder does not intend to enforce such remedies. Interest payable upon the occurrence of a contingency (such as the existence of profits) is not unconditionally payable.

(2) *Variable rate debt instrument.* In the case of a variable rate debt instrument, "qualified stated interest" is defined in § 1.1275-5(e).

(3) *Stated interest in excess of qualified stated interest.* To the extent

that stated interest payable under a debt instrument exceeds qualified stated interest, the excess is included in the debt instrument's stated redemption price at maturity.

(4) *Short-term obligations.* In the case of a short-term obligation (as defined in section 1283(a)(1)(A)), no payments of interest are considered to be qualified stated interest.

(d) *De minimis OID*—(1) *In general.* If the amount of OID with respect to a debt instrument is less than the de minimis amount, the amount of OID is treated as zero, and all stated interest is treated as qualified stated interest.

(2) *De minimis amount.* The de minimis amount is an amount equal to 0.0025 multiplied by the product of the stated redemption price at maturity and the number of complete years to maturity from the issue date.

(3) *Installment obligations.* In the case of an installment obligation (as defined in paragraph (e)(1) of this section), paragraph (d)(2) of this section is applied by substituting for the "number of complete years to maturity" the weighted average maturity (as defined in paragraph (e)(3) of this section). Alternatively, in the case of a debt instrument that provides for payments of principal no more rapidly than a self-amortizing installment obligation (as defined in paragraph (e)(2) of this section), the de minimis amount defined in paragraph (d)(2) of this section may be calculated by substituting 0.00167 for 0.0025.

(4) *Special rule for variable rate debt instruments.* If a variable rate debt instrument (within the meaning of § 1.1275-5(a)) has stated interest that is not unconditionally payable at least annually, the amount of OID on the debt instrument is considered to be greater than the de minimis amount.

(5) *Special rule for interest holidays, teaser rates, and other interest shortfalls*—(i) *In general.* Solely for the purpose of determining whether OID is de minimis, the rule in this paragraph (d)(5) generally treats teaser rates, interest holidays, and certain other interest shortfalls as resulting in OID equal to the amount of interest foregone during the period of the teaser, holiday, or shortfall. This rule applies if—

(A) The amount of OID is more than the de minimis amount as otherwise determined under paragraph (d) of this section; and

(B) All stated interest provided for in the debt instrument would be qualified stated interest under paragraph (c) of this section except that for one or more accrual periods the interest rate is below the rate applicable for the remainder of the instrument's term (e.g., if as a result

of an interest holiday, all stated interest is not qualified stated interest).

(ii) *Redetermination of stated redemption price at maturity.* For purposes of determining whether a debt instrument described in paragraph (d)(5)(i) of this section has de minimis OID, the stated redemption price at maturity is treated as equal to the stated principal amount plus the amount of additional stated interest that would be necessary to be payable on the instrument in order for all stated interest to be qualified stated interest under paragraph (c) of this section. In applying the preceding sentence, the additional amount that is added to the stated redemption price at maturity is reduced (but not below zero) by the difference between the debt instrument's issue price and its stated principal amount. See Example 3 of paragraph (f) of this section. In addition, the weighted average maturity of the debt instrument under paragraph (e)(3) of this section is determined by ignoring the stated interest payments.

(6) *Treatment of de minimis OID by holders*—(i) *Allocation of de minimis OID to principal payments.* The holder of a debt instrument includes any de minimis OID in income as stated principal payments are made. The amount includible in income with respect to each principal payment equals the product of the total amount of de minimis OID on the instrument and a fraction, the numerator of which is the amount of the principal payment made and the denominator of which is the stated principal amount of the instrument. Any amount of de minimis OID includible in income under the preceding sentence is treated as an amount received in retirement of the debt instrument for purposes of section 1271.

(ii) *Character of de minimis OID.* Any gain attributable to de minimis OID that is recognized on the sale or exchange of a debt instrument is capital gain if the debt instrument is a capital asset in the hands of the seller.

(iii) *Cross-reference.* See § 1.1272-3 for an election by an accrual method holder to treat de minimis OID as OID.

(e) *Definitions*—(1) *Installment obligation.* An installment obligation is a debt instrument that provides for the payment of any amount other than qualified stated interest before maturity.

(2) *Self-amortizing installment obligation.* A self-amortizing installment obligation is an obligation that provides for equal payments composed of principal and qualified stated interest that are unconditionally payable at least annually during the entire term of the debt instrument with no significant

additional payment required at maturity.

(3) *Weighted average maturity.* The weighted average maturity of a debt instrument is the sum of the amounts obtained by multiplying the amount of each payment under the instrument (other than a payment of qualified stated interest) by a fraction, the numerator of which is the number of complete years from the issue date until the payment is made and the denominator of which is the stated redemption price at maturity.

(f) *Examples.* The provisions of this section are illustrated by the following examples.

Example 1. Qualified stated interest—(i) *Facts.* On January 1, 1994, A purchases at original issue, for \$100,000, a debt instrument that matures on January 1, 1998 and has a stated principal amount of \$100,000, payable at maturity. The debt instrument provides for interest payments of \$8,000 on January 1, 1995 and January 1, 1996, and quarterly interest payments of \$1,943, beginning on April 1, 1996.

(ii) *Amount of qualified stated interest.* The annual payments of \$8,000 and the quarterly payments of \$1,943 reflect interest payable at a single fixed rate because 8 percent, compounded annually, is equivalent to 7.77 percent, compounded quarterly. Consequently, all stated interest payments under the debt instrument are qualified stated interest payments.

Example 2. Stated interest in excess of qualified stated interest—(i) *Facts.* On January 1, 1994, B purchases at original issue, for \$100,000, C corporation's five-year debt instrument. The debt instrument provides for a principal payment of \$100,000, payable at maturity, and calls for annual interest payments of \$10,000 for the first 3 years and annual interest payments of \$10,600 for the last two years.

(ii) *Payments in excess of qualified stated interest.* All of the first three interest payments and \$10,000 of each of the last two interest payments are qualified stated interest payments within the meaning of paragraph (c)(1) of this section. Under paragraph (c)(3) of this section, the remaining \$600 of each of the last two interest payments is included in the stated redemption price at maturity, so that the stated redemption price at maturity is \$101,200. Pursuant to paragraph (e)(3) of this section, the weighted average maturity of the debt instrument is 4.994 years $\{(4 \text{ years} \times \$600/\$101,200) + (5 \text{ years} \times \$100,600/\$101,200)\}$. The de minimis amount, or one-fourth of one percent of the stated redemption price at maturity multiplied by the weighted average maturity, is \$1,263.50. Because the actual amount of discount, \$1,200, is less than the de minimis amount, the instrument is treated as having no OID, and, under paragraph (d)(1) of this section, all of the interest payments are considered to be qualified stated interest.

Example 3. De minimis OID: interest holiday—(i) *Facts.* On January 1, 1994, C purchases at original issue, for \$97,561, a debt instrument that matures on January 1, 2006 and has a stated principal amount of

\$100,000, payable at maturity. The debt instrument provides for an initial interest holiday of one quarter and quarterly interest payments of \$2,500 thereafter (beginning on July 1, 1994). The issue price of the debt instrument is \$97,561.

(ii) *De minimis amount of OID.* But for the interest holiday, all stated interest on the debt instrument would be qualified stated interest. Under paragraph (d)(5) of this section, for purposes of determining whether the debt instrument has de minimis OID, the stated redemption price at maturity of the instrument is \$100,061 (\$100,000 (stated principal amount) plus \$2,500 (additional interest for the initial period) minus \$2,439 (the difference between the instrument's stated principal amount and issue price)). Thus, the debt instrument is treated as having OID of \$2,500 (\$100,061 minus \$97,561). Because this amount is less than the de minimis amount of \$3,000 (0.0025 multiplied by \$100,000 multiplied by 12 complete years to maturity), the debt instrument is treated as having no OID, and all stated interest is treated as qualified stated interest.

(iii) *If debt instrument had greater than de minimis OID.* If the issue price were \$97,000 or less, the debt instrument would not have de minimis OID. In that case, none of the stated interest would be qualified stated interest. If, for example, the issue price were \$97,000, the stated redemption price at maturity would be \$217,500 (\$100,000 plus all stated interest), and the debt instrument would have \$120,500 of OID to be accounted for under the rules of § 1.1272-1.

§ 1.1273-2 Determination of issue price.

(a) *Publicly offered debt instruments not issued for property—(1) In general.* Except as provided in paragraph (a)(3) of this section, the issue price of a debt instrument that is part of an issue of publicly offered debt instruments not issued for property is the first price at which a substantial amount of the debt instruments included in the issue is sold to the public. For this purpose, the public does not include bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters or wholesalers. The issue price does not change if part of the issue is subsequently sold at a different price.

(2) *Publicly offered debt instruments defined.* A debt instrument is publicly offered if it is part of an issue of debt instruments the initial offering of which—

(i) Is registered with the Securities and Exchange Commission; or

(ii) Would be required to be registered under the Securities Act of 1933 but for an exemption from registration—

(A) Under section 3 of the Securities Act of 1933 (relating to exempted securities);

(B) Under sections 2 or 4 of the Securities Act of 1933 because of the identity of the issuer or the nature of the security; or

(C) Because the issue is intended for distribution to persons who are not United States persons.

(3) *Publicly offered Treasury securities.* The issue price of an issue of publicly offered Treasury securities is the average price of the debt instruments sold. See § 1.1275-2(d) for rules regarding additional Treasury securities issued in the qualified reopening.

(b) *Other debt instruments not issued for property—(1) In general.* The issue price of an issue of debt instruments not issued for property and not publicly offered is the price paid by the first buyer of an instrument that is part of the issue. For this purpose, the first buyer does not include any bond house, broker, or similar person or organization acting in the capacity of an underwriter, placement agent, or wholesaler. Typically, the issue price of a debt instrument evidencing a loan to a natural person is determined under this paragraph (b)(1).

(2) *Below-market loans subject to section 7872(b).* The issue price of a below-market loan subject to section 7872(b) (a term loan other than a gift loan) is the issue price determined under this section, reduced by the excess amount determined under section 7872(b)(1).

(c) *Debt instruments issued for property where there is trading on an established market—(1) Publicly traded debt instruments.* The issue price of a debt instrument issued for property is the debt instrument's fair market value, as of the issue date, if the debt instrument is part of an issue a portion of which is traded on an established market.

(2) *Non-publicly traded debt instruments issued for publicly traded property.* The issue price of a debt instrument issued for property is the property's fair market value, as of the issue date, if the debt instrument—

(i) Is not part of an issue a portion of which is traded on an established market; and

(ii) Is issued for property that is traded on an established market.

(3) *Definition of property.* For purposes of this section, "property" means a debt instrument, stock, security, contract, commodity, or currency.

(d) *Traded on an established market—(1) In general.* Property is traded on an established market for purposes of section 1273(b)(3) if, at any time during the 60-day period ending 30 days after the issue date (as defined in § 1.1275-1(e)), the property is described in paragraph (d)(2), (d)(3), (d)(4), or (d)(5) of this section.

(2) *Exchange listed property.* Property is described in this paragraph if it is listed on—

(i) A national securities exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f);

(ii) An interdealer quotation system sponsored by a national securities association registered under section 15A of the Securities Exchange Act of 1934: or

(iii) The International Stock Exchange of the United Kingdom and the Republic of Ireland, Limited, the Luxembourg Stock Exchange, the Frankfurt Stock Exchange, the Tokyo Stock Exchange, or any other foreign exchange or board of trade that is designated by the Commissioner in a revenue ruling or revenue procedure (see § 601.601(d)(2)(ii)(b) of this chapter).

(3) *Market traded property.* Property is described in this paragraph if it is traded either on a board of trade that is designated as a contract market by the Commodities Futures Trading Commission or on an interbank market.

(4) *Property appearing on a quotation medium.* Property is described in this paragraph if it appears on a system of general circulation (a quotation medium) that provides a reasonable basis to determine fair market value by disseminating either recent price quotations of identified brokers and dealers (including those of a single, identified broker or dealer) or actual prices of recent sales transactions. A quotation medium includes a computer listing of recent sales prices that is disseminated to subscribing brokers, dealers, or traders. A quotation medium does not include a directory of listing of brokers or dealers for specific securities that provides neither quotations nor actual prices of recent sales transactions, such as the "yellow sheets."

(5) *Readily quotable debt instruments—(i) In general.* A debt instrument is described in this paragraph if price quotations are readily available from dealers and brokers.

(ii) *Safe harbors.* A debt instrument is not considered to be described in paragraph (d)(5)(i) of this section if—

(A) No other outstanding debt instrument of the issuer (or of any person who guarantees the debt instrument) is described in paragraphs (d)(2), (d)(3), or (d)(4) of this section (such debt collectively being "other traded debt");

(B) The original stated principal amount of the issue that includes the debt instrument does not exceed \$25 million;

(C) The conditions and covenants relating to the issuer's performance with respect to the debt instrument are materially less restrictive than the conditions and covenants included in all of the issuer's other traded debt (e.g., the debt instrument is subject to an economically significant subordination provision whereas the issuer's other traded debt is senior); or

(D) The maturity date of the debt instrument is more than three years after the latest maturity date of the issuer's other traded debt.

(6) *Effect of certain temporary restrictions on trading.* If there is any temporary restriction on trading a purpose of which is to avoid the characterization of the property as one that is traded on an established market for Federal income tax purposes, then the property is treated as traded on an established market. For purposes of the preceding sentence, a temporary restriction on trading need not be imposed by the issuer.

(7) *Convertible debt instruments.* A debt instrument is not treated as traded on an established market solely because the debt instrument is convertible into property which is so traded.

(e) *Other debt instruments.* Under section 1273(b)(4), the issue price of a debt instrument that is not determined under paragraphs (a) through (d) of this section and that is not determined under section 1274 is the instrument's stated redemption price at maturity.

(f) *Investment units—(1) In general.* Under section 1273(c)(2), the issue price of an investment unit that is publicly traded or that is issued for cash or publicly traded property is determined in accordance with the rules of section 1273 and this section as if the investment unit were a debt instrument. The issue price is allocated between the debt instrument and the property right (or rights) that comprise the unit based on their relative fair market values.

(2) *Consistent allocation by holders and issuer.* The issuer's allocation of the issue price of the investment unit is binding on all holders of the investment unit. However, the issuer's determination is not binding on a holder that explicitly discloses that its allocation of the issue price of the investment unit is different from the issuer's allocation. The disclosure must be made on the form prescribed by the Commissioner and attached to the holder's timely filed Federal income tax return for the tax year that includes the acquisition date of the investment unit.

(g) *Convertible debt instruments.* The issue price of a debt instrument that is convertible into another debt instrument or stock of either the issuer or a related

party (as defined in section 267(b) or section 707(b)(1)) includes any amount paid with respect to the conversion privilege, even if the privilege may be satisfied or exercised for the cash value of the other debt instrument or stock.

(h) *Treatment of amounts representing pre-issuance accrued interest—(1) Applicability.* Paragraph (h)(2) of this section provides an optional rule for determining the issue price of a debt instrument if—

(i) A portion of the initial purchase price of the instrument is allocable to interest that has accrued prior to the issue date (pre-issuance accrued interest); and

(ii) The instrument provides for a payment of stated interest on the first payment date within one year of the issue date that equals or exceeds the amount of the pre-issuance accrued interest.

(2) *Exclusion of pre-issuance accrued interest from issue price.* If a debt instrument meets the requirements of paragraph (h)(1) of this section, the instrument's issue price may be computed by subtracting from the issue price (as otherwise computed under the rules of this section) the amount of pre-issuance accrued interest. If the issue price of the instrument is computed in this manner, a portion of the stated interest payable on the first payment date must be treated as a return of the excluded pre-issuance accrued interest, rather than as an amount payable on the debt instrument.

(i) [Reserved]

(j) *Treatment of certain cash payments incident to lending transactions—(1) Applicability.* The provisions of this paragraph (j) apply to cash payments made incident to private lending transactions (including seller financing).

(2) *Payments from borrower to lender.* In a lending transaction to which section 1273(b)(2) applies, a payment from the borrower to the lender (other than a payment for services provided by the lender, such as commitment fees or loan processing costs) reduces the issue price of the debt instrument evidencing the loan. In a transaction to which section 1274 applies, a payment from the buyer to the seller that is designated as interest or points reduces the stated principal amount of the debt instrument evidencing the loan. However, solely for purposes of the borrower (buyer), this paragraph (j)(2) does not apply to a payment of points that is deductible by the borrower (buyer) under section 461(g)(2).

(3) *Payments from lender to borrower.* A payment from the lender to the

borrower in a lending transaction is treated as an amount loaned.

(4) *Payments between lender and third party.* If, as part of a lending transaction, a party other than the borrower (the third party) makes a payment to the lender, that payment is treated in appropriate circumstances as made from the third party to the borrower followed by a payment in the same amount from the borrower to the lender and governed by the provisions of paragraph (j)(2) of this section. If, as part of a lending transaction, the lender makes a payment to a third party, that payment is treated in appropriate circumstances as an additional amount loaned to the borrower and then paid by the borrower to the third party. The character of the deemed payment between the borrower and the third party depends on the substance of the transaction.

(5) *Examples.* The provisions of this paragraph (j) are illustrated by the following examples.

Example 1. Payments from borrower to lender in a cash transaction—(i) Facts. A lends \$100,000 to B for a term of 10 years. At the time the loan is made, B pays \$4,000 in points to A. Assume that the points are not deductible by B under section 461(g)(2) and that the stated redemption price at maturity of the debt instrument is \$100,000.

(ii) *Payment results in OID.* Under paragraph (j)(2) of this section, the issue price of B's debt instrument evidencing the loan is \$96,000. As a result, the debt instrument has \$4,000 of OID. Because the \$4,000 is more than a de minimis amount of OID, the points are accounted for by both A and B as OID under section 1272 and the regulations thereunder.

Example 2. Payments from borrower to lender in a section 1274 transaction—(i) Facts. A sells property to B for \$1,000,000 in a transaction that is not a potentially abusive situation (within the meaning of § 1.1274-3). In consideration therefor, B gives A \$300,000 and issues a five-year debt instrument with a stated principal amount of \$700,000, payable at maturity, and that calls for semiannual payments of interest at a rate of 8.5 percent. In addition to the cash downpayment, B pays A \$14,000 designated as points on the loan. Assume that the points are not deductible under section 461(g)(2).

(ii) *Issue price.* Under paragraph (j)(2) of this section, the stated principal amount of B's debt instrument is \$686,000 (\$700,000 minus \$14,000). Assuming a test rate of 9 percent, compounded semiannually, the imputed principal amount of B's debt instrument under § 1.1274-2(c)(1) is \$686,153. Under § 1.1274-2(b)(1), the issue price of B's debt instrument is the stated principal amount of \$686,000. As a result, the debt instrument has \$14,000 of OID. Because the \$14,000 is more than a de minimis amount of OID, the points are accounted for by both A and B as OID under section 1272 and the regulations thereunder B's basis in the property purchased is

\$1,000,000 (\$686,000 debt instrument plus \$314,000 cash payments).

Example 3. Payments between lender and third party—(i) Facts. A sells Blackacre to B for \$500,000 in a transaction that is not a potentially abusive situation (within the meaning of § 1.1274-3). B makes a cash down payment of \$100,000 and borrows \$400,000 of the purchase price from a lender, L, repayable in annual installments over a term of 15 years calling for interest at a rate of 9 percent, compounded annually. As part of the transaction, A makes a payment of \$8,000 to L to facilitate the loan to B.

(ii) *Payment results in a de minimis amount of OID.* Under the provisions of paragraphs (j)(2) and (j)(4) of this section, B is treated as having made an \$8,000 payment directly to L and a payment of only \$492,000 to A for Blackacre. Thus, B's basis in Blackacre is \$492,000. The payment to L reduces the issue price of B's debt instrument to \$392,000, resulting in \$8,000 of OID (\$400,000-\$392,000). Because the amount of OID is de minimis under § 1.1273-1(d), L must account for the de minimis OID under § 1.1273-1(d)(6). *But see* § 1.1272-3 (election to treat de minimis OID as OID). B must account for the de minimis OID under § 1.163-7.

§ 1.1274-1 Debt instruments to which section 1274 applies.

(a) *Types of debt instruments to which section 1274 applies.* Subject to the exceptions and limitations in paragraph (b) of this section, section 1274 and this section apply to any debt instrument given in consideration for the sale or exchange of property. For purposes of section 1274, "property" includes debt instruments and investment units, but does not include U.S. currency, services, or the right to use property. For the treatment of certain payments for the use of property or services, see sections 404 and 467.

(b) *Exceptions—(1) Debt instrument with adequate stated interest and no OID.* Section 1274 does not apply to a debt instrument if—

- (i) All interest payable on the instrument is qualified stated interest;
- (ii) The stated rate of interest is at least equal to the test rate of interest (as defined in § 1.1274-4); and
- (iii) The debt instrument is not issued in a potentially abusive situation (as defined in § 1.1274-3).

(2) *Exceptions under sections 1274(c)(1)(B), 1274(c)(3), 1274(c), and 1275(b)(1)—(i) In general.* Sections 1274(c)(1)(B), 1274(c)(3), 1274A(c), and 1275(b)(1) describe certain transactions to which section 1274 does not apply. This paragraph provides certain rules to be used in applying those exceptions.

(ii) *Special rules for certain exceptions under section 1274(c)(3)—(A) Determination of sales price for certain sales of farms.* For purposes of section 1274(c)(3)(A), the determination

as to whether the sales price cannot exceed \$1,000,000 is made without regard to any other exception to, or limitation on, the applicability of section 1274 (e.g., without regard to the special rules regarding sales of principal residences and land transfers between related persons). In addition, the sales price is determined without regard to section 1274 and without regard to any stated interest. The sales price includes the amount of any liability included in the amount realized from the sale or exchange (see § 1.1001-2).

(B) *Sales involving total payments of \$250,000 or less.* Under section 1274(c)(3)(C), the determination of the amount of payments due under all debt instruments and the amount of other consideration to be received is made as of the date of the sale or exchange or, if earlier, the contract date. If the precise amount due under any debt instrument or the precise amount of any other consideration to be received cannot be determined as of that date, section 1274(c)(3)(C) applies only if it can be determined that the maximum of the aggregate amount of payments due under the debt instruments and other consideration to be received cannot exceed \$250,000. For purposes of determining the aggregate amount of payments due, if a liability is assumed or property is taken subject to a liability, the outstanding principal balance or adjusted issue price (in the case of an obligation originally issued at a discount) of the obligation assumed or taken subject to is taken into account.

(3) *Other exceptions to section 1274—*

(i) *Holders of certain below-market instruments.* Section 1274 does not apply to any holder of a debt instrument that—

(A) Is given in consideration for the sale or exchange of property that is personal use property (within the meaning of section 1275(b)(3)) in the hands of the issuer; and

(B) Evidences a below-market gift loan (described in section 7872(c)(1)(A)), a below-market compensation-related loan (described in section 7872(c)(1)(B)), or a below-market corporation-shareholder loan (described in section 7872(c)(1)(C)).

(ii) *Transactions involving certain demand loans.* Section 1274 does not apply to any debt instrument that evidences a demand loan that is either a gift loan (described in section 7872(c)(1)(A)), a compensation-related loan (described in section 7872(c)(1)(B)), or a corporation-shareholder loan (described in section 7872(c)(1)(C)).

(iii) *Certain transfers subject to section 1041.* Section 1274 does not apply to any debt instrument issued in

consideration for a transfer of property subject to section 1041 (relating to transfers of property between spouses or incident to divorce).

(c) *Examples.* The provisions of this section are illustrated by the following examples.

Example 1. Single stated rate paid semiannually. A debt instrument issued in consideration for the sale of nonpublicly traded property in a transaction that is not a potentially abusive situation calls for the payment of a principal amount of \$1,000,000 at the end of a ten-year term and 20 semiannual interest payments of \$60,000. Assume that the test rate of interest is 12 percent, compounded semiannually. The debt instrument is not subject to section 1274 because it provides for interest equal to the test rate and all interest payable on the instrument is qualified stated interest.

Example 2. Sale of farm for debt instrument with contingent interest—(i) Facts. On July 1, 1995, A, an individual, sells to B land used as a farm within the meaning of section 6420(c)(2). As partial consideration for the sale, B issues a debt instrument calling for a single \$500,000 payment due in ten years unless profits from the land in each of the ten years preceding maturity of the debt instrument exceed a specified amount, in which case B is to make a payment of \$1,200,000. No interest is provided for in the debt instrument.

(ii) *Total payments may exceed \$1,000,000.* Even though the total payments ultimately payable under the contract may be less than \$1,000,000, at the time of the sale or exchange it cannot be determined that the sales price cannot exceed \$1,000,000. Thus, the sale of the land used as a farm is not an excepted transaction described in section 1274(c)(3)(A).

Example 3. Sale between related parties subject to section 483(e)—(i) Facts. On July 1, 1995, A, an individual, sells land (not used as a farm within the meaning of section 6420(c)(2)) to A's child B for \$650,000. In consideration for the sale, B issues a debt instrument to A that calls for a payment of \$650,000. No other consideration is given. The debt instrument is due in ten years. No interest is provided for in the debt instrument.

(ii) *Bifurcation of debt instrument.* For purposes of section 483(e), the \$650,000 debt instrument is treated as two separate debt instruments: a \$500,000 debt instrument and a \$150,000 debt instrument. The \$500,000 debt instrument is subject to section 483(e), and accordingly is covered by the exception from section 1274 described in section 1274(c)(3)(F). Because the amount of the payments due as consideration for the sale exceeds \$250,000, the \$150,000 debt instrument is subject to section 1274.

§ 1.1274-2 Treatment of debt instruments to which section 1274 applies.

(a) *In general.* If section 1274 applies to a debt instrument, section 1274 and this section determine the issue price of the debt instrument. For rules relating to the determination of the amount and

timing of OID to be included in income, see section 1272 and the regulations thereunder.

(b) *Issue price*—(1) *Debt instruments that provide for adequate stated interest; stated principal amount.* The issue price of a debt instrument that provides for adequate stated interest is the stated principal amount of the debt instrument. For purposes of section 1274, the stated principal amount of a debt instrument is the aggregate amount of all payments due under the debt instrument, excluding any amount of stated interest.

(2) *Debt instruments that do not provide for adequate stated interest; imputed principal amount.* The issue price of a debt instrument that does not provide for adequate stated interest is the imputed principal amount of the debt instrument (as determined under paragraphs (c), (d), and (e) of this section).

(3) *Debt instruments issued in a potentially abusive situation; fair market value.* Notwithstanding paragraphs (b)(1) and (b)(2) of this section, in the case of a debt instrument issued in a potentially abusive situation (as defined in § 1.1274-3), the issue price of the debt instrument is the fair market value of the property received in exchange for the debt instrument, reduced by the fair market value of any consideration other than the debt instrument given in consideration for the sale or exchange.

(c) *Determination of whether a debt instrument provides for adequate stated interest*—(1) *In general.* A debt instrument provides for adequate stated interest if its stated principal amount is less than or equal to its imputed principal amount. "Imputed principal amount" means the sum of the present values, as of the issue date, of all payments, including payments of stated interest, due under the debt instrument (determined by using a discount rate equal to the test rate of interest as determined in § 1.1274-4). If a debt instrument has a single stated rate of interest that is paid or compounded at least annually, and that rate is equal to or greater than the test rate, the debt instrument has adequate stated interest.

(2) *Determination of present value.* The present value of a payment is the amount that, if invested on the computation date at a compound rate of interest equal to the test rate, would increase in value to the amount of the future payment on the payment date. To determine present value, a compounding period must be selected, and the test rate must be based on the same compounding period.

(3) *Treatment of certain options*—(i) *In general.* This paragraph (c)(3) provides rules for determining the issue price of a debt instrument to which section 1274 applies (other than a debt instrument issued in a potentially abusive situation) that is subject to one or more options described in paragraph (c)(3)(ii) of this section. The holder of a debt instrument with an option is presumed to exercise the option if the imputed principal amount of the debt instrument, assuming exercise of the option, exceeds the imputed principal amount of the debt instrument, assuming the option is not exercised. The issuer of a debt instrument with an option is presumed to exercise the option if the imputed principal amount of the debt instrument, assuming exercise of the option, is less than the imputed principal amount of the debt instrument, assuming the option is not exercised. See § 1.1272-1(d)(3) to determine the debt instrument's yield and maturity for purposes of determining the accrual of OID with respect to the instrument.

(ii) *Described options.* An option is described in this paragraph if it is not separately alienable from the debt instrument and allows a holder or issuer the unconditional right to accelerate or defer payments on one or more dates during the term of the debt instrument. However, an option is not described in this paragraph (c)(3) if, as of the issue date, the amounts payable on the debt instrument upon exercise of the option are not fixed. See paragraph (e) of this section for the treatment of a debt instrument with payments contingent as to amount.

(4) *Examples.* The provisions of paragraph (c) of this section are illustrated by the following examples. Each example assumes a 30-day month, 360-day year. In addition, each example assumes that the debt instrument is not a qualified debt instrument (as defined in section 1274A(b)) or issued in a potentially abusive situation.

Example 1. Debt instrument without a fixed rate over its entire term—(i) *Facts.* On January 1, 1994, A sells nonpublicly traded property to B for a stated purchase price of \$3,500,000. In consideration for the sale, B makes a down payment of \$500,000 and issues a ten-year debt instrument with a stated principal amount of \$3,000,000, payable at maturity. The debt instrument calls for no interest in the first two years and interest at a rate of 15 percent payable annually over the remaining eight years of the debt instrument. The first interest payment of \$450,000 is due on December 31, 1996, and the last interest payment is due on December 31, 2003, together with the \$3,000,000 payment of principal. Assume that the test rate of interest applicable to the

debt instrument is 10.5 percent, compounded annually.

(ii) *Determination of present value.* Because the debt instrument does not call for a fixed rate of interest no lower than the test rate of interest for its entire term, the debt instrument has adequate stated interest only if the stated principal amount is less than or equal to the imputed principal amount. To compute the imputed principal amount, all payments due under the debt instrument must be discounted back to the issue date at 10.5 percent, compounded annually, as follows:

(A) The present value of the \$3,000,000 principal payment payable on December 31, 2003, is \$1,105,347, determined as follows:

$$\$1,105,347 = \frac{\$3,000,000}{(1 + .105/1)^{10}}$$

(B) The present value of the eight interest payments of \$450,000 as of January 1, 1996, (the interim date) is \$2,357,635, determined as follows:

$$\$2,357,635 = \$450,000 \times \frac{1 - (1 + .105/1)^{-8}}{(.105/1)}$$

(C) The present value of this interim amount as of January 1, 1994, the computation date, is \$1,930,865, determined as follows:

$$\$1,930,865 = \frac{\$2,357,635}{(1 + .105/1)^2}$$

(iii) *Determination of issue price.* The debt instrument's imputed principal amount (that is, the total present value of all payments due under the debt instrument) is \$3,036,212 (\$1,105,347 + \$1,930,865). Because the stated principal amount (\$3,000,000) is less than the imputed principal amount, the debt instrument provides for adequate stated interest. However, because none of the interest on the debt instrument is qualified stated interest, the instrument's stated redemption price at maturity (as defined in section 1273(a)(2)) exceeds the instrument's stated principal amount by \$3,600,000 (\$450,000 × 8). Therefore, the debt instrument is subject to section 1274. The issue price of the debt instrument is its stated principal amount (\$3,000,000).

Example 2. Debt instrument subject to issuer call option—(i) *Facts.* On January 1, 1994, in partial consideration for the sale of nonpublicly traded property, H corporation issues to G a ten-year debt instrument, maturing on January 1, 2004, with a stated principal amount of \$10,000,000, payable on that date. The debt instrument provides for annual payments of interest of eight percent for the first five years and 14 percent for the final five years, payable on January 1 of each year, beginning on January 1, 1995. In addition, the debt instrument provides H with the option to call (prepay) the debt instrument at the end of five years for its full face amount of \$10,000,000. Assume that the applicable Federal mid-term and long-term

rates applicable to the sale based on annual compounding are nine percent and ten percent, respectively.

(ii) *Option presumed exercised.* Assuming exercise of the call option, the imputed principal amount as determined under paragraph (c)(1) of this section is \$9,611,034.87 (the present value of all of the payments due within a five-year term discounted at a test rate of nine percent, compounded annually). Assuming nonexercise of the call option, the imputed principal amount is \$10,183,354.78 (the present value of all of the payments due within a ten-year term discounted at a test rate of ten percent, compounded annually). For purposes of determining the imputed principal amount, the option is presumed exercised because the imputed principal amount assuming exercise of the option is less than the imputed principal amount assuming the option is not exercised. If the option is presumed exercised, the debt instrument fails to provide adequate stated interest. Thus, the issue price of the instrument is \$9,611,034.87.

(d) *Treatment of variable rate debt instruments—(1) Stated interest at a qualified floating rate—(i) In general.* For purposes of paragraph (c) of this section, the imputed principal amount of a variable rate debt instrument (within the meaning of § 1.1275-5(a)) that provides for stated interest at a qualified floating rate (or rates) is determined by assuming that the instrument provides for a fixed rate of interest for each accrual period to which a qualified floating rate applies. For purposes of the preceding sentence, the assumed fixed rate in each accrual period is the value of the qualified floating rate as of the date of the sale or exchange (or, if earlier, the contract date). See § 1.1274-4(c) to determine the test rate for a variable rate debt instrument that provides for stated interest at a qualified floating rate (or rates).

(ii) *Interest rate limitations.* Notwithstanding paragraph (d)(1)(i) of this section, if, as a result of interest rate limitations (such as an interest rate cap), the expected yield of the debt instrument taking the limitations into account is significantly less than the expected yield of the debt instrument without regard to the limitations, the interest payments on the debt instrument (other than any fixed interest payments) are treated as contingent payments subject to paragraph (e) of this section. Generally, reasonably symmetric interest rate caps and floors do not result in the debt instrument being subject to this rule.

(2) *Stated interest at a single objective rate.* For purposes of paragraph (c) of this section, the imputed principal amount of a variable rate debt instrument (within the meaning of

§ 1.1275-5(a)) that provides for stated interest at a single objective rate is determined by treating the interest payments as contingent payments subject to paragraph (e) of this section.

(e) *Contingent payments—(1) General rule.* For purposes of paragraph (c)(1) of this section, the stated principal amount of a debt instrument that provides for contingent payments is the maximum amount of the contingent and noncontingent payments, excluding any amount of stated interest (whether or not contingent). The imputed principal amount of such a debt instrument is the sum of the present values of the noncontingent payments as determined under paragraph (c) of this section, and the fair market value of the contingent payments as of the issue date. If the fair market value of the contingent payments cannot be determined when separated from the noncontingent payments, the imputed principal amount of the debt instrument is its fair market value. Only in rare and extraordinary cases will the fair market value of the debt instrument be treated as not reasonably ascertainable. For additional rules relating to contingent payments, see § 1.1275-4.

(2) *Special rule for earn-outs.* Notwithstanding paragraph (e)(1) of this section, the imputed principal amount of a debt instrument that provides for contingent interest payments is its stated principal amount if—

(i) All or a portion of the contingent interest payments are conditioned on a return from the exploitation of the property acquired for the debt instrument (including payments conditioned on profits, sales, rents, production, or royalties);

(ii) The debt instrument would provide for adequate stated interest under paragraph (c) of this section at a test rate of interest equal to 80 percent of the test rate applicable to the debt instrument; and

(iii) It is reasonable to expect that contingent payments of interest described in paragraph (e)(2)(i) of this section will raise the total yield on the debt instrument to at least the test rate of interest applicable to the debt instrument.

(f) *Examples.* The provisions of paragraph (d) of this section are illustrated by the following examples. Each example assumes a 30-day month, 360-day year. In addition, each example assumes that the debt instrument is not a qualified debt instrument (as defined in section 1274A(b)) or issued in a potentially abusive situation.

Example 1. Variable rate debt instrument with a single rate over its entire term—(1)

Facts. On January 1, 1994, A sells B nonpublicly traded property. In partial consideration for the sale, B issues a debt instrument in the principal amount of \$1,000,000, payable in five years. The debt instrument calls for interest payable monthly at a rate of one percentage point above the average prime lending rate of a major bank for the month preceding the month of the interest payment. Assume that the test rate of interest applicable to the debt instrument is 10.5 percent, compounded monthly. On the date the test rate of interest is determined, one percentage point above the prime lending rate of the designated bank is 12.5 percent, compounded monthly.

(ii) *Debt instrument has adequate stated interest.* The debt instrument is a variable rate debt instrument within the meaning of § 1.1275-5. Under paragraph (d)(1)(i) of this section, the debt instrument is treated as if it provided for a fixed rate of interest equal to 12.5 percent, compounded monthly. Because the test rate of interest is 10.5 percent, compounded monthly, the debt instrument provides for adequate stated interest.

Example 2. Debt instrument with a capped variable rate. On July 1, 1995, A sells nonpublicly traded property to B in return for a debt instrument with a stated principal amount of \$10,000,000 payable on July 1, 2005. Interest is payable on July 1 of each year, beginning on July 1, 1996, at the Federal short-term rate for June of the same year. The debt instrument provides, however, that the interest rate cannot rise above 8.5 percent, compounded annually. Assume that as of the date the test rate of interest with respect to the debt instrument is determined, the Federal short-term rate is eight percent, compounded annually. Assume further that as a result of the interest rate cap of 8.5 percent, compounded annually, the expected yield of the debt instrument is significantly less than the expected yield of the debt instrument if it did not include the interest rate cap. Under paragraph (d)(1)(ii) of this section, the variable payments are treated as contingent payments for purposes of this section.

§ 1.1274-3 Potentially abusive situations defined.

(a) *In general.* For purposes of section 1274, a "potentially abusive situation" means—

(1) A tax shelter (as defined in section 6662(d)(2)(C)(ii)); or

(2) Any other situation involving—

- (i) A recent sales transaction;
- (ii) Nonrecourse financing;
- (iii) Financing with a term in excess of the useful life of the property; or
- (iv) A debt instrument with clearly excessive interest.

(b) *Operating rules—(1) Debt instruments exchanged for nonrecourse financing.* "Nonrecourse financing" does not include an exchange of a nonrecourse debt instrument for an outstanding recourse or nonrecourse debt instrument.

(2) *Nonrecourse debt with substantial down payment.* The term "nonrecourse

financing" does not include a sale or exchange of a real property interest financed by a nonrecourse debt instrument, if, in addition to the nonrecourse debt instrument, the purchaser provides a down payment that equals or exceeds 20 percent of the total stated purchase price of the real property interest. For purposes of the preceding sentence, a "real property interest" means any interest, other than an interest solely as a creditor, in real property.

(3) *Clearly excessive interest.* Interest on a debt instrument is clearly excessive if the interest, in light of the terms of the debt instrument and the creditworthiness of the borrower, is clearly greater than the arm's length amount of interest that would have been charged in a cash lending transaction between the same two parties.

(c) *Other situations to be specified by ruling.* The Commissioner may designate by revenue ruling or revenue procedure situations that, although described in paragraph (a)(2) of this section, will not be treated as potentially abusive because they do not have the effect of significantly misstating basis or amount realized.

(d) *Consistency rule.* The issuer's determination that the debt instrument is or is not issued in a potentially abusive situation is binding on all holders of the debt instrument. However, the issuer's determination is not binding on a holder who explicitly discloses a position that is inconsistent with the issuer's determination. The disclosure must be made on the form prescribed by the Commissioner and attached to the holder's timely filed Federal income tax return for the tax year that includes the acquisition date of the debt instrument.

§ 1.1274-4 Test rate.

(a) *Determination of test rate of interest—(1) In general.* Except as otherwise provided in sections 1274(e) and 1274A, the test rate of interest is the applicable Federal rate based on an appropriate compounding period.

(2) *Sale-leaseback transactions.* For purposes of section 1274(e)(3), "related party" means a person related to the transferor within the meaning of sections 267(b) or 707(b)(1).

(b) *Applicable Federal rate defined.* Except as otherwise provided in this section, the applicable Federal rate is defined in section 1274(d). The applicable Federal rates are published monthly in revenue rulings (see § 601.601(d)(2)(ii)(b) of this chapter).

(c) *Certain variable rate debt instruments—(1) In general.* Except as otherwise provided in paragraph (c)(2)

of this section, in the case of a variable rate debt instrument (as defined in § 1.1275-5(a)) with stated interest at a qualified floating rate (or rates), the applicable Federal rate is determined by reference to the longest interval between interest adjustment dates of the qualified floating rate, or, if the variable rate debt instrument provides for an initial fixed rate, the interval during which the fixed rate of interest applies, if it is longer.

(2) *Limitations on adjustments.* If, due to significant limitations on variations in a qualified floating rate of interest (such as those imposed by periodic or permanent limitations in the amount by which the variable rate can increase or decrease), the qualified floating rate in substance resembles a fixed rate, the applicable Federal rate is determined by reference to the term of the debt instrument.

(d) *Lower rate permitted in certain cases—(1) In general.* The applicable Federal rate with respect to certain debt instruments having a maturity of 6 months or less is the allowable Treasury index rate (as defined in paragraph (d)(2) of this section), if the issuer provides on the face of the debt instrument (or, if applicable, in the master advance agreement) that the debt instrument qualifies as having adequate stated interest under section 1274(d)(1)(D) and if the issuer and holder agree to treat the debt instrument as having adequate stated interest. All successors and assignees thereof are bound by this agreement.

(2) *Allowable Treasury index rates.* The allowable Treasury index rates are based on the rates published periodically by the Federal Reserve (*i.e.*, Federal Reserve Statistical Releases G.13 and H.15) and, at any given time, are the lowest of the following rates for any day within (or for any weekly period ending within) the preceding 15 days. In the case of debt instruments having a maturity of 3 or 6 months, the allowable Treasury index rates are the auction average yield (investment) on the most recently auctioned U.S. Treasury bills of the same maturity as the debt instrument. In the case of debt instruments having a maturity between 3 and 6 months, the allowable Treasury index rate is a linear interpolation of the auction average yield (investment) on the most recently auctioned U.S. Treasury bills with maturities of 3 and 6 months. In the case of debt instruments having a maturity of 3 months or less, the allowable Treasury index rate is the market yield on U.S. Treasury bills of the same maturity as the debt instrument.

(e) *Foreign currency loans.* In the case of a debt instrument that is denominated in a foreign currency, the applicable Federal rate is a foreign currency rate of interest analogous to the applicable Federal rate described in this section. An analogous foreign currency rate of interest is a rate of interest based on yields (with an appropriate compounding period) of the highest grade of outstanding marketable obligations denominated in such currency (excluding any obligations that benefit from special tax exemptions or preferential tax rates not available to debt instruments generally) with due consideration given to the maturities of the obligations.

(f) *Installment obligations.* For purposes of determining the test rate of interest for an installment obligation (as defined in § 1.1273-1(e)(1)), the term of the obligation is its weighted average maturity (as defined in § 1.1273-1(e)(3)).

(g) *Date for determining the applicable Federal rate of interest.* For purposes of section 1274, the applicable Federal rate with respect to a debt instrument is the lowest of the applicable Federal rates in effect during the three-month period ending with the first month in which there is a binding contract (including an irrevocable option) in writing that substantially sets forth the terms under which the sale or exchange is ultimately consummated. If there is no binding contract in writing for the sale or exchange, the three-month period described in the preceding sentence ends with the month in which the sale or exchange occurs.

(h) *Examples.* The provisions of this section are illustrated by the following examples. Each example assumes that the debt instrument is not issued in a potentially abusive situation.

Example 1. Variable rate debt instrument that limits the amount of increase and decrease in the rate—(i) Facts. On July 1, 1996, A sells nonpublicly traded property to B in return for a five-year debt instrument that provides for interest to be paid on July 1 of each year, beginning on July 1, 1997, based on the prime rate of a local bank on that date. However, the interest rate cannot increase or decrease from one year to the next by more than .25 percentage points (25 basis points).

(ii) *Significant limitation.* The debt instrument is a variable rate debt instrument as defined in § 1.1275-5. Assume that based on all the facts and circumstances, the limitation is a significant limitation on the variations in the rate of interest. Under paragraph (c)(2) of this section, the applicable Federal rate is determined by reference to the term of the debt instrument, and the applicable Federal rate is the Federal mid-term rate.

Example 2. Installment obligation—(i) Facts. On January 1, 1996, A sells

nonpublicly traded property to B in exchange for a debt instrument that calls for a payment of \$500,000 on January 1, 2001, and a payment of \$1,000,000 on January 1, 2006. The debt instrument does not provide for any stated interest.

(ii) *Determination of term.* The debt instrument is an installment obligation. Under paragraph (f) of this section, the term of the debt instrument is its weighted average maturity (as defined in § 1.1273-1(e)(1)). The debt instrument's weighted average maturity is 8.33 years, which is the sum of (A) the ratio of the first payment to total payments (500,000/1,500,000), multiplied by the number of complete years from the issue date until the payment is due (five years), and (B) the ratio of the second payment to total payments (1,000,000/1,500,000), multiplied by the number of complete years from the issue date until the second payment is due (ten years).

(iii) *Applicable Federal rate.* Based on the calculation in paragraph (ii) of this example, the term of the debt instrument is treated as 8.33 years. Consequently, the test rate is the mid-term applicable Federal rate.

§ 1.1274-5 Assumptions.

(a) *In general.* Section 1274 does not apply to a debt instrument if the debt instrument is assumed, or property is taken subject to the debt instrument, in connection with a sale or exchange of property, unless the terms of the debt instrument, as part of the sale or exchange, are modified in a manner that would constitute an exchange under section 1001.

(b) *Modification of debt instruments—(1) In general.* Except as provided in paragraph (b)(2) of this section, if a debt instrument is assumed, or property is taken subject to a debt instrument, in connection with a sale or exchange of property, the terms of the debt instrument are modified as part of the sale or exchange, and the modification triggers an exchange under section 1001, the modification is treated as a separate transaction taking place immediately before the sale or exchange and is attributed to the seller of the property. For purposes of this paragraph, a debt instrument is not considered to be modified as part of the sale or exchange unless the seller knew or had reason to know about the modification.

(2) *Election to treat buyer as modifying the debt instrument.* Rather than having the rules in paragraph (b)(1) of this section apply, the seller and buyer may jointly elect to treat the transaction as one in which the buyer first assumed the original (unmodified) debt instrument and then subsequently modified the debt instrument. For this purpose, the modification is treated as a separate transaction taking place immediately after the sale or exchange. The buyer and seller may only make this election before the last day

(including extensions) for filing the Federal income tax returns of both the buyer and seller for the taxable year reporting the sale or exchange of the property and must attach the prescribed statement to their Federal income tax returns. The buyer and seller make the election by jointly signing the statement, which includes the following information—

(i) The names, addresses, and taxpayer identification numbers of the seller and buyer; and

(ii) A clear indication that the election is being made under paragraph (b)(2) of this section.

(c) *Wraparound indebtedness.* For purposes of paragraph (a) of this section, the issuance of wraparound indebtedness is not considered an assumption.

(d) *Consideration attributable to assumed debt.* If, as part of the consideration for the sale or exchange of property, the buyer assumes or takes subject to an indebtedness that was issued at a discount (including a debt instrument issued in a prior sale or exchange to which section 1274 applied), the portion of the buyer's basis in the property and the seller's amount realized attributable to the debt instrument equals the adjusted issue price of the debt instrument as of the date of the sale or exchange.

(e) *Example.* The provisions of paragraph (b)(2) of this section are illustrated by the following example.

Example. Assumption of a debt instrument in conjunction with a modification—(i) Facts. On July 1, 1996, B sells Blackacre to C for \$40,000,000 subject to an existing debt instrument held by A with a face amount of \$10,000,000 and a remaining term of ten years. The debt instrument provides for annual interest payments at eight percent, compounded annually. As part of the sale, C assumes the debt instrument and the debt instrument is materially modified within the meaning of section 1001.

(ii) *Modification occurs before the sale.* Unless B and C jointly elect under paragraph (b)(2) of this section, the modification is treated as taking place immediately before the sale in a transaction involving B and A. C is treated as having assumed the modified debt instrument.

§ 1.1274A-1 Special rules for certain transactions where stated principal amount does not exceed \$2,800,000.

(a) *Overview.* Section 1274A allows the use of a lower test rate for purposes of sections 483 and 1274 in the case of a qualified debt instrument (as defined in section 1274A(b)) and, if elected by the borrower and the lender, the use of the cash receipts and disbursements method of accounting for interest on a cash method debt instrument (as defined in section 1274A(c)(2)). This

section provides special rules for qualified debt instruments and cash method debt instruments.

(b) *Rules for both qualified and cash method debt instruments—(1) Sale-leaseback transactions.* A debt instrument issued in a sale-leaseback transaction (within the meaning of section 1274(e)) cannot be either a qualified debt instrument or a cash method debt instrument.

(2) *Debt instruments calling for contingent payments.* A debt instrument cannot be a qualified debt instrument unless it can be determined at the time of the sale or exchange that the maximum amount of the stated principal due under the debt instrument cannot exceed the amount specified in section 1274A(b). Similarly, a debt instrument cannot be a cash method debt instrument unless it can be determined at the time of the sale or exchange that the maximum amount of the stated principal due under the debt instrument cannot exceed the amount specified in section 1274A(c)(2)(A).

(3) *Aggregation of transactions—(i) General rule.* The aggregation rules of section 1274A(d)(1) are applied using a facts and circumstances test.

(ii) *Examples.* The following examples illustrate the application of section 1274A(d)(1) and paragraph (b)(3)(i) of this section.

Example 1. Aggregation of two sales to a single person. In two transactions evidenced by separate sales agreements, A sells undivided half interests in Blackacre to B. The sales are pursuant to a plan for the sale of a 100 percent interest in Blackacre to B. These sales or exchanges are part of a series of related transactions and, thus, are treated as a single sale for purposes of section 1274A.

Example 2. Aggregation of two purchases by unrelated individuals. Pursuant to a plan, unrelated individuals X and Y purchase undivided half interests in Blackacre from A and subsequently contribute these interests to a partnership in exchange for equal interests in the partnership. These purchases are treated as part of the same transaction and, thus, are treated as a single sale for purposes of section 1274A.

Example 3. Aggregation of sales made pursuant to a tender offer. Fifteen unrelated individuals own all the stock of X Corporation. Y Corporation makes a tender offer to these 15 shareholders. The terms offered to each shareholder are identical. Shareholders holding a majority of the shares of X Corporation elect to tender their shares pursuant to Y Corporation's offer. These sales are part of the same transaction and, thus, are treated as a single sale for purposes of section 1274A.

Example 4. No aggregation for separate sales of similar property to unrelated persons. Pursuant to a newspaper advertisement, X Corporation offers for sale similar condominiums in a single building.

The prices of the units vary due to a variety of factors, but the financing terms offered by X Corporation to all buyers are identical. The units are purchased by unrelated buyers who decided whether to purchase units in the building at the price and on the terms offered by X Corporation, without regard to the actions of other buyers. Because each buyer acts individually, the sales are not part of the same transaction or a series of related transactions and, thus, are treated as separate sales.

(4) *Inflation adjustment of dollar amounts.* Under section 1274A(d)(2), the dollar amounts specified in sections 1274A(b) and 1274A(c)(2)(A) are adjusted for inflation. The dollar amounts, adjusted for inflation, will be published in revenue rulings or other administrative pronouncements (see § 601.601(d)(2)(ii)(b) of this chapter).

(c) *Rules for cash method debt instruments—(1) Time and manner of making cash method election.* The borrower and lender must each make the election described in section 1274A(c)(2)(D) on or before the last day (including extensions) for filing each of their Federal income tax returns for the taxable year in which the debt instrument is issued and must attach the prescribed statement to their timely filed returns. The borrower and lender make the election by jointly signing the statement, which includes the following information—

(i) The names, addresses and taxpayer identification numbers of the borrower and lender;

(ii) A clear indication that an election is being made under section 1274A(c)(2); and

(iii) A statement that the debt instrument with respect to which the election is being made fulfills the requirements of a cash method debt instrument.

(2) *Successors of electing parties.* Except as otherwise provided in this paragraph (c)(2), the cash method election under section 1274A(c) applies to any successor of the electing lender or borrower (or any transferee thereof). Thus, for any period after the transfer of a cash method debt instrument, the successor takes into account the interest (including unstated interest) thereon under the cash receipts and disbursements method of accounting. Nevertheless, if the lender (or any successor thereof) transfers the cash method debt instrument to a taxpayer who uses an accrual method of accounting, section 1272 rather than section 1274A(c) applies to the successor of the lender (or a successor thereof) with respect to the debt instrument for any period after the date of the transfer. The borrower (or any

successor thereof), however, remains on the cash receipts and disbursements method of accounting with respect to the cash method debt instrument.

(3) *Modified debt instrument.* In the case of a debt instrument issued in a debt-for-debt exchange that qualifies as an exchange under section 1001, the debt instrument is eligible for the election to be a cash method debt instrument if the other prerequisites to making the election in section 1274A(c) are met. However, if a principal purpose of the modification is to defer interest income or deductions through the use of the election, then the debt instrument is not eligible for the election.

(4) *Debt incurred or continued to purchase or carry a cash method debt instrument.* No interest deduction is allowed for interest on a debt instrument that is incurred or continued to purchase or carry a cash method debt instrument. For purposes of the preceding sentence, rules similar to those under section 265(a)(2) apply to determine whether a debt instrument is incurred or continued to purchase or carry a cash method debt instrument.

§ 1.1275-1 Definitions.

(a) *Applicability.* The definitions contained in this section apply for purposes of sections 163(e) and 1271 through 1275 and the regulations thereunder.

(b) *Adjusted issue price.* The adjusted issue price of a debt instrument at the beginning of the first accrual period is the issue price. Thereafter, the adjusted issue price of the debt instrument is the issue price of the debt instrument—

(1) Increased by the amount of OID previously includible in the gross income of any holder (determined without regard to section 1272(a)(7) and section 1272(c)(1)); and

(2) Decreased by the amount of any payment previously made on the debt instrument other than a payment of qualified stated interest.

(c) *OID.* "OID" means original issue discount (as defined in section 1273(a) and §§ 1.1273-1 and 1.1273-2).

(d) *Debt instrument.* Except as provided in section 1275(a)(1)(B) (relating to certain annuity contracts), "debt instrument" means any instrument or contractual arrangement that constitutes indebtedness under general principles of Federal income tax law.

(e) *Issue date—(1) Publicly offered debt instruments.* In the case of debt instruments that are publicly offered (as defined in § 1.1273-2(a)(2)), "issue date" means the first settlement date for the sale to the public (within the meaning of § 1.1273-2(a)(1)) of a

substantial amount of the debt instruments included in that issue. See § 1.1275-2(d) for rules relating to reopenings of Treasury securities.

(2) *Non-publicly offered debt instruments not issued for property.* The issue date of an issue of debt instruments not issued for property and not publicly offered is the date on which the first buyer purchases an instrument that is part of the issue.

(3) *Debt instruments distributed by corporations with respect to stock.* The issue date of a debt instrument distributed by a corporation with respect to its stock is the date of the distribution.

(4) *Other debt instruments issued for property.* In the case of a debt instrument not described in paragraph (e)(1), (e)(2), or (e)(3) of this section, the issue date is the date on which the debt instrument is issued in a sale or exchange.

(f) *Tax-exempt obligations.* For purposes of section 1275(a)(3)(B), "exempt from tax" means exempt from Federal income tax.

(g) *Issue.* Two or more publicly offered debt instruments (as described in § 1.1273-2(a)(2)) are part of the same issue if they have the same credit and payment terms and are sold at substantially the same time pursuant to a common plan of marketing. Two or more debt instruments that are not publicly offered are part of the same issue if they have the same credit and payment terms and are issued as part of a single transaction or a series of related transactions. See § 1.1275-2(d) for rules relating to reopenings of Treasury securities.

(h) *Debt instruments issued by a natural person.* If an entity is a primary obligor under a debt instrument, the debt instrument is considered to be issued by the entity and not by a natural person even if a natural person is a co-maker and is jointly liable for the debt instrument's repayment. A debt instrument issued by a partnership is considered to be issued by the partnership as an entity even if the partnership is composed entirely of natural persons.

§ 1.1275-2 Special rules relating to debt instruments.

(a) *Payment ordering rule.* Each payment under a debt instrument (other than a payment of qualified stated interest or, in the case of the issuer, a payment of points deductible under section 461(g)(2)) is treated first as a payment of OID to the extent of the OID that has accrued as of the date of payment and has not been allocated to prior payments and second as a

payment of principal. Thus, no portion of any payment (other than, in the case of the issuer, a payment of points deductible under section 461(g)(2)) is treated as prepaid interest.

(b) *Debt instruments distributed by corporations with respect to stock.* A debt instrument distributed by a corporation with respect to its stock is treated as issued by the corporation for property. See section 1275(a)(4). Thus, under section 1273(b)(3), the issue price of a distributed debt instrument that is traded on an established market is its fair market value. The issue price of a distributed debt instrument that is not traded on an established market is determined under section 1274 or section 1273(b)(4). See also § 1.1275-1(e)(3) (issue date of distributed debt instrument).

(c) *Aggregation of debt instruments—*

(1) *General rule.* Except as provided in paragraph (c)(2) of this section, debt instruments issued in connection with the same transaction or related transactions (determined based on all the facts and circumstances) are treated as a single debt instrument for purposes of sections 1271 through 1275 and the regulations thereunder. This rule ordinarily applies only to debt instruments of a single issuer that are issued to a single holder. The Commissioner may, however, aggregate debt instruments that are issued by more than one issuer or that are issued to more than one holder if the debt instruments are issued in an arrangement that is designed to avoid the aggregation rule (e.g., debt instruments issued by or to related parties or debt instruments originally issued by different issuers or to different holders with the understanding that the debt instruments will be assumed by a single issuer or transferred to a single holder).

(2) *Exception if separate issue price established.* Paragraph (c)(1) of this section does not apply to a debt instrument if—

(i) The debt instrument is part of an issue a portion of which is separately traded on an established market within the meaning of § 1.1273-2(c); or

(ii) The debt instrument is part of an issue a substantial portion of which is issued for cash (or for property traded on an established market within the meaning of § 1.1273-2(c)) to parties who are not related to the issuer or holder and who do not purchase other debt instruments of the same issuer in connection with the same transaction or related transactions.

(3) *Special rule for debt instruments that provide for the issuance of additional debt instruments.* If under

the terms of a debt instrument (the original debt instrument) the holder may receive one or more additional debt instruments of the issuer, the additional instrument or instruments are aggregated with the original debt instrument. Thus, the payments made pursuant to an additional instrument are treated as made on the original debt instrument, and the distribution by the issuer of the additional instrument is not considered to be a payment made on the original debt instrument. See § 1.1272-1(d) for the treatment of certain rights to issue additional debt instruments in lieu of cash payments.

(4) *Examples.* The rules set forth in paragraphs (c)(1) and (c)(2) of this section are illustrated by the following examples.

Example 1. Exception for debt instruments issued separately to other purchasers. On January 1, 1994, Corporation M issues two series of bonds, Series A and Series B. The two series are sold for cash and have different terms. Although some holders purchase bonds from both series, a substantial portion of the bonds are issued to different holders. H purchases bonds from both series. Under the exception in paragraph (c)(2)(ii) of this section, the Series A and Series B bonds purchased by H are not aggregated.

Example 2. Tiered REMICs. Z forms a dual tier real estate mortgage investment conduit (REMIC). In the dual tier structure, Z forms REMIC A to acquire a pool of real estate mortgages and to issue a residual interest and several classes of regular interests. Contemporaneously, Z forms REMIC B to acquire as qualified mortgages all of the regular interests in REMIC A. REMIC B issues several classes of regular interests and a residual interest, and Z sells all of those interests to unrelated parties in a public offering. Under the general rule set out in paragraph (c)(1) of this section, all of the regular interests issued by REMIC A and held by REMIC B are treated as a single debt instrument for purposes of section 1271 through 1275.

(d) *Special rules for reopenings of Treasury securities—*(1) *Treatment of additional Treasury securities.*

Additional Treasury securities issued in a qualified reopening are part of the same issue as the original Treasury securities and have the same issue date as the original Treasury securities. The issue price of both the original Treasury securities and the additional Treasury securities is the average price at which the original Treasury securities were sold.

(2) *Definitions—*(i) *Additional Treasury securities.* Additional Treasury securities are Treasury securities with terms that are in all respects identical to the terms of the original Treasury securities and that are issued (without regard to paragraph (d)(1) of this

section) not more than twelve months after the original Treasury securities were first issued to the public.

(ii) *Original Treasury securities.* Original Treasury securities are securities comprising any issue of outstanding Treasury securities.

(iii) *Qualified reopening.* A qualified reopening is a reopening of Treasury securities intended to alleviate an acute, protracted shortage of the original Treasury securities.

§ 1.1275-3 OID Information reporting requirements.

(a) *In general.* This section provides legending and information reporting requirements intended to facilitate the reporting of OID.

(b) *Information required to be set forth on face of debt instruments that are not publicly offered—*(1) *In general.* Except as provided in paragraph (b)(4) or paragraph (d) of this section, the requirements of this paragraph (b) apply to any debt instrument that is not publicly offered (within the meaning of § 1.1273-2(a)(2)), is issued in physical form, and has OID. The issuer of any such debt instrument must legend the instrument by stating on the face of the instrument that the debt instrument was issued with OID. In addition, the issuer must either—

(i) Set forth on the face of the debt instrument the issue price, the amount of OID, the issue date, and the yield to maturity; or

(ii) Provide the name and either the address or telephone number of a representative of the issuer who will, beginning no later than 10 days after the issue date, promptly make available to holders upon request the information described in paragraph (b)(1)(i) of this section.

(2) *Time for legending.* An issuer may satisfy the requirements of this paragraph by legending the debt instrument when it is first issued in physical form. Legending is not required, however, before the first holder of the debt instrument disposes of the instrument.

(3) *Legend must survive reissuance upon transfer.* Any new physical security that is issued (for example, upon registration of transfer of ownership) must contain any required legend.

(4) *Exceptions.* The requirements of paragraph (b)(1) of this section do not apply to debt instruments described in section 1272(a)(2) (relating to debt instruments not subject to the periodic OID inclusion rules), debt instruments issued by natural persons (as defined in § 1.6049-4(f)(2)), REMIC regular interests or other debt instruments

subject to section 1272(a)(6), or stripped bonds and coupons within the meaning of section 1286.

Par. 8. Section 1.1275-5, as proposed on April 8, 1986 (51 FR 12094), is revised to read as follows:

§ 1.1275-5 Variable rate debt instruments.

(a) *Applicability*—(1) *In general*. This section provides rules for variable rate debt instruments. For purposes of section 163(e) and sections 1271 through 1275, a variable rate debt instrument is a debt instrument that meets the conditions described in paragraphs (a)(2), (a)(3), and (a)(4) of this section.

(2) *Principal payments*. The debt instrument must provide for total noncontingent principal payments that are at least equal to the instrument's issue price.

(3) *Stated interest*. The debt instrument must provide for stated interest (compounded or paid at least annually) at—

- (i) A single qualified floating rate;
- (ii) A single qualified floating rate followed by a second qualified floating rate;
- (iii) A single fixed rate followed by a single qualified floating rate; or
- (iv) A single objective rate.

(4) *Current value*. The debt instrument must provide that each qualified floating rate or objective rate in effect during an accrual period is set at a current value of that rate. A current value is the value of the rate on any day occurring during the interval that begins three months prior to the first day on which that value is in effect under the debt instrument and ends one year following that day.

(b) *Qualified floating rate*—(1) *In general*. For purposes of this section, a floating rate is a qualified floating rate if variations in the rate can reasonably be expected to measure contemporaneous variations in the cost of newly borrowed funds. A multiple of a qualified floating rate is generally not a qualified floating rate.

(2) *Restrictions on the stated rate of interest*. Notwithstanding paragraph (b)(1) of this section, restrictions on the maximum or minimum stated interest rate, restrictions on the amount of increase or decrease in the stated interest rate, or other similar restrictions generally do not result in a rate failing to be treated as a qualified floating rate. However, a rate is not a qualified floating rate if it is subject to a cap (or similar restriction) that is very likely to cause the interest rate in one or more accrual periods, known as of the issue date, to be significantly less than the overall expected return on the debt

instrument. In addition, a rate is not a qualified floating rate if it is subject to a floor (or similar restriction) that is very likely to cause the interest rate in one or more accrual periods, known as of the issue date, to be significantly more than the overall expected return on the debt instrument.

(c) *Objective rate*—(1) *In general*. For purposes of this section, an objective rate is a rate (other than a qualified floating rate) based on the price of property that is actively traded (within the meaning of section 109(d)(1)), or on an index of the prices of such property. An objective rate is also a rate that is based on one or more qualified floating rates, but that is not itself a qualified floating rate under paragraph (b)(1) of this section. For example, a multiple of a qualified floating rate is an objective rate. An objective rate, however, must be determined using a single formula that is fixed throughout the term of the debt instrument.

(2) *Exceptions*—(i) *Restrictions on the stated rate of interest*. Notwithstanding paragraph (c)(1) of this section, a restriction described in paragraph (b)(2) of this section or a formulation of the objective rate that is substantially similar to such a restriction generally does not result in the rate failing to be an objective rate. However, a rate is not an objective rate if it is subject to a cap (or similar restriction) or a formulation of the objective rate that is substantially similar to a cap) that is very likely to cause the interest rate in one or more accrual periods, known as of the issue date, to be significantly less than the overall expected return on the debt instrument. In addition, a rate is not an objective rate if it is subject to a floor (or similar restriction) or a formulation of the objective rate that is substantially similar to a floor) that is very likely to cause the interest rate in one or more accrual periods, known as of the issue date, to be significantly more than the overall expected return on the debt instrument.

(ii) *Tax-exempt debt*. Notwithstanding paragraph (c)(1) of this section, a debt instrument governed by section 103 does not provide for stated interest at an objective rate if the issuer, contemporaneously with the issuance, enters into one or more financial contracts (other than a debt instrument of the issuer) that substantially offset the variations in the stated interest.

(iii) *Nonfunctional currency*. Notwithstanding paragraph (c)(1) of this section, an objective rate does not include a rate based on the price of nonfunctional currency of the taxpayer or a qualified business unit (as defined in section 989(a)).

(d) *Examples*. The provisions of paragraph (b) and (c) of this section are illustrated by the following examples. For purposes of these examples, assume that the exceptions in paragraphs (b)(2) and (c)(2) of this section do not apply.

Example 1. Rate is based on LIBOR. X issues a debt instrument that provides for annual payments of interest at a rate equal to the one-year London Interbank Offered Rate (LIBOR) at the end of each year. Variations in one-year LIBOR over the term of the instrument can reasonably be expected to measure contemporaneous variations in the cost of newly borrowed funds over that term. Accordingly, the rate is a qualified floating rate.

Example 2. Rate increased by a fixed amount. X issues a debt instrument that provides for annual payments of interest at a rate equal to 200 basis points (two percent) plus the current value, at the end of each year, of the average yield on one-year Treasury securities as published in Federal Reserve bulletins. This rate can reasonably be expected to measure contemporaneous variations in the cost of newly borrowed funds. Accordingly, the rate is a qualified floating rate.

Example 3. Rate is based on commercial paper rate. X issues a debt instrument that provides for a rate of interest that is periodically adjusted to equal the current interest rate of Bank's commercial paper. This rate can reasonably be expected to measure contemporaneous variations in the cost of newly borrowed funds. Accordingly, the rate is a qualified floating rate.

Example 4. Rate is based on an inflation index. X issues a debt instrument that provides for annual payments of interest at a rate equal to 400 basis points (four percent) plus the annual percentage change in a general inflation index (e.g. the Consumer Price Index, U.S. City Average, All Items, for all Urban Consumers, seasonally unadjusted). Because inflation is a component of borrowing costs, this rate can reasonably be expected to measure contemporaneous variations in the cost of newly borrowed funds. Accordingly, the rate is a qualified floating rate.

Example 5. Changes in the price of a commodity index. X issues a debt instrument that provides for annual interest payments at the end of each year at a rate equal to the percentage increase, if any, in the price of an actively traded commodity for the year immediately preceding the payment. The rate of interest on this debt instrument is not reasonably expected to measure contemporaneous variations in the cost of newly borrowed funds. Accordingly, the stated rate is not a qualified floating rate. However, because the rate is based on the price of actively traded property, the rate is an objective rate.

Example 6. Changes based on issuer profits. Z issues a debt instrument that provides for annual interest payments equal to 20 percent of Z's net profits earned during the year immediately preceding the payment. This rate is not reasonably expected to measure contemporaneous variations in the cost of newly borrowed funds. Accordingly,

the rate is not a qualified floating rate. In addition, because the stated rate is neither based on the price of actively traded property nor based on a qualified floating rate, the rate is not an objective rate.

Example 7. Changes based on a multiple of an interest index. Z issues a debt instrument with annual interest payments at a rate equal to the excess of three times annual LIBOR over ten percent. Changes in the rate are not reasonably expected to measure changes in the cost of newly borrowed funds (e.g., a one percent increase in LIBOR results in a three percent increase in the rate, which does not measure changes in the costs of newly borrowed funds). Accordingly, the rate is not a qualified floating rate. However, because the stated rate is based on a qualified floating rate using a formula that is fixed over the term of the debt instrument, the rate is an objective rate.

Example 8. Inverse floater. Z issues a debt instrument that provides for monthly interest payments equal to the stated principal amount times a rate equal to ten percent, compounded monthly, less the value of one-month LIBOR as of the payment date. This rate is not reasonably expected to measure contemporaneous variations in the cost of newly borrowed funds. Accordingly, the rate is not a qualified floating rate. However, because the stated rate is based on a qualified floating rate, the rate is an objective rate.

(e) *Qualified stated interest on a variable rate debt instrument.* In general, stated interest on a variable rate debt instrument is qualified stated interest if the interest is unconditionally payable in cash or in property (other than debt instruments of the issuer) at least annually. See § 1.1273-1(c)(1) to determine whether interest is unconditionally payable.

However, if a variable rate debt instrument provides for a fixed rate followed by a qualified floating rate or a qualified floating rate followed by another qualified floating rate, any accelerated interest or deferred interest on the debt instrument (as described in paragraph (f) of this section) is not qualified stated interest.

(f) *Accelerated and deferred interest—(1) Debt instruments that provide for a fixed rate followed by a qualified floating rate—(i) In general.* A variable rate debt instrument that provides for a fixed rate followed by a qualified floating rate has accelerated interest or deferred interest unless the fixed rate is a reasonable substitute for the qualified floating rate during the interval for which the fixed rate is applicable (the initial interval). The fixed rate is a reasonable substitute for the qualified floating rate if the variable rate debt instrument would have approximately the same fair market value as a hypothetical debt instrument with identical terms except that the hypothetical debt instrument provides for the qualified floating rate during the

initial interval. If, based on this comparison, the variable rate debt instrument would be more valuable than the hypothetical debt instrument, the variable rate debt instrument has accelerated interest. Conversely, if the variable rate debt instrument would be less valuable than the hypothetical debt instrument, the variable rate debt instrument has deferred interest.

(ii) *Accelerated interest—(A) Amount of accelerated interest.* Accelerated interest is the stated interest accruing in the initial interval that is attributable to the number of percentage points that must be subtracted from the fixed rate to make the fixed rate a reasonable substitute for the qualified floating rate.

(B) *Example of accelerated interest.* The rule in paragraph (f)(1)(ii)(A) of this section is illustrated by the following example.

Example. A five-year debt instrument provides for annual payments of interest. For the first two years, the rate of interest is five percent, compounded annually. For the final three years, the rate of interest is the current value of one-year LIBOR on each payment date. The debt instrument is a variable rate debt instrument. If the fair market value of the variable rate debt instrument would be greater than the fair market value of an otherwise identical hypothetical debt instrument that provides for one-year LIBOR during the first two years, the variable rate debt instrument has accelerated interest. Assume that the fair market value of the variable rate debt instrument would be the same as that of the hypothetical debt instrument if the fixed rate on the variable rate debt instrument was four percent, rather than five percent. The amount of accelerated interest on the variable rate debt instrument is the amount of stated interest during the first two years that corresponds to 100 basis points (one percent) per year. The remainder of the stated interest (four percent, compounded annually, for the first two years and one-year LIBOR for the last three years) is qualified stated interest if it is unconditionally payable at least annually.

(iii) *Deferred interest—(A) Amount of deferred interest.* Deferred interest is the stated interest accruing in the subsequent interval that is attributable to the number of percentage points that must be subtracted from the qualified floating rate to make the fixed rate a reasonable substitute for the qualified floating rate.

(B) *Example of deferred interest.* The rule in paragraph (f)(1)(iii)(A) of this section is illustrated by the following example.

Example. A five-year debt instrument provides for annual payments of interest. For the first two years, the rate of interest is three percent, compounded annually. For the final three years, the rate of interest is the current value of one-year LIBOR on each payment date. The debt instrument is a variable rate

debt instrument. If the fair market value of the variable rate debt instrument would be less than the fair market value of an otherwise identical hypothetical debt instrument that provides for one-year LIBOR during the first two years, the debt instrument has deferred interest. Assume that the fair market value of the variable rate debt instrument would be the same as that of the hypothetical debt instrument if the qualified floating rate on the variable rate debt instrument was one-year LIBOR less 100 basis points (one percent), rather than one-year LIBOR. The amount of deferred interest on the variable rate debt instrument is the amount of stated interest during the last three years that corresponds to 100 basis points (one percent) per year. The remainder of the stated interest (three percent, compounded annually, for the first two years and one-year LIBOR less 100 basis points (one percent) for the last three years) is qualified stated interest if it is unconditionally payable at least annually.

(2) *Debt instruments that provide for one qualified floating rate followed by a second qualified floating rate.* If a variable rate debt instrument provides for one qualified floating rate followed by a second qualified floating rate, the amount of accelerated interest or deferred interest is determined in accordance with the principles of paragraph (f)(1) of this section. For example, if the interest rate of a variable rate debt instrument during the initial interval is less than the interest rate during the subsequent interval by a fixed number of percentage points (e.g., LIBOR followed by LIBOR plus three percentage points), the amount of deferred interest is the stated interest in the subsequent interval that is attributable to that fixed number of percentage points.

(g) *General principles for accrual of OID with respect to a variable rate debt instrument—(1) In general.* A variable rate debt instrument may have OID because all stated interest is not unconditionally payable at least annually, because the stated principal amount exceeds the issue price (true discount), or because a portion of the stated interest is accelerated or deferred interest. OID must be recognized in a manner that reasonably reflects the principles described in paragraphs (g)(2) and (g)(3) of this section. See § 1.1273-1(d) to determine whether the amount of OID is de minimis.

(2) *Accrual of stated interest other than qualified stated interest, accelerated interest or deferred interest.* OID for an accrual period arising from stated interest that is not unconditionally payable at least annually (other than accelerated or deferred interest) is the amount of this stated interest that actually accrues

under the terms of the debt instrument during the accrual period.

(3) *Accrual of true discount, accelerated interest, and deferred interest.* Any true discount, accelerated interest, or deferred interest on a variable rate debt instrument must be allocated to an accrual period using the constant yield method (described in § 1.1272-1). A reasonable application of the constant yield method is to disregard all stated interest with respect to the variable rate debt instrument (other than any accelerated or deferred interest) and assume that the instrument provides for qualified stated interest payments at the end of each accrual period computed at a reasonable fixed rate. For purposes of the preceding sentence, qualified stated interest payments are generally computed at a reasonable fixed rate if the payments, combined with any true discount, accelerated interest or deferred interest, provide a yield to maturity that approximates the applicable Federal rate.

(h) *Examples.* The provisions of paragraphs (e), (f), and (g) of this section are illustrated by the following examples.

Example 1. Variable rate debt instrument with qualified stated interest. On January 1, 1994, A purchases at original issue, for \$100,000, B corporation's debt instrument that matures on January 1, 2004, and has a stated principal amount of \$100,000, payable at maturity. The debt instrument provides for semiannual payments of interest payable on January 1 and July 1 of each year, beginning on July 1, 1994. The rate on which each interest payment is based is the Federal short-term rate in effect at the beginning of each semiannual period that immediately precedes the payment. Under paragraph (b)(1) of this section, the interest rate is a qualified floating rate. Under paragraph (e) of this section, all stated interest payments are qualified stated interest payments.

Example 2. Variable rate debt instrument with an initial fixed rate and no accelerated or deferred interest—(i) Facts. On January 1, 1994, E purchases at original issue, for \$100,000, F corporation's debt instrument that matures on December 31, 2003, and has a stated principal amount of \$100,000, payable at maturity. The debt instrument provides for annual payments of interest on December 31 of each year, beginning on December 31, 1994. For the first five years, the interest rate is five percent, compounded annually. For the final five years, the interest rate is the value of one-year LIBOR on each payment date plus 100 basis points (one percent).

(ii) *Qualified stated interest.* The debt instrument is a variable rate debt instrument. Assume that, based on all the facts and circumstances, the variable rate debt instrument has approximately the same fair market value as an otherwise identical hypothetical debt instrument that provides for annual payments of one-year LIBOR plus 100 basis points (one percent) for the first five years. The fixed rate of five percent, compounded annually, is a reasonable substitute for one-year LIBOR plus 100 basis points (one percent), compounded annually. Under paragraph (f)(1) of this section, the debt instrument does not provide for accelerated or deferred interest. Thus, all of the stated interest payments are qualified stated interest payments.

Example 3. Variable rate debt instrument with an initial fixed rate and with deferred interest—(i) Facts. On January 1, 1994, E purchases at original issue, for \$100,000, F corporation's debt instrument that matures on December 31, 2003, and has a stated principal amount of \$100,000, payable at maturity. The debt instrument provides for annual payments of interest on December 31 of each year, beginning on December 31, 1994. For the first five years, the rate of interest is four percent, compounded annually. For the final five years, the rate of interest is the value of one-year LIBOR on each payment date plus 200 basis points (two percent).

(ii) *Determination of deferred interest.* The debt instrument is a variable rate debt instrument. Under paragraph (f)(1) of this

section, the variable rate debt instrument provides for accelerated or deferred interest if the fixed rate is not a reasonable substitute for the qualified floating rate during the initial period. Assume that, based on all of the facts and circumstances, four percent, compounded annually, is not a reasonable substitute for one-year LIBOR plus 200 basis points (two percent), compounded annually, and that four percent, compounded annually, is a reasonable substitute for one-year LIBOR, compounded annually. The debt instrument has deferred interest. The amount of the deferred interest is the amount of stated interest accruing in years six through ten that corresponds to two hundred basis points (two percent) per year. Under paragraph (e) of this section, for the first five years, all of the stated interest payments are qualified stated interest, and for the last five years, stated interest payments at a rate equal to one-year LIBOR are qualified stated interest payments.

(iii) *Accrual of deferred interest on a variable rate debt instrument.* Under paragraph (g)(3) of this section, the amount of deferred interest allocable to an accrual period is determined using the constant yield method. A reasonable application of the constant yield method is to disregard all qualified stated interest on the variable rate debt instrument and assume that the instrument provides for qualified stated interest at a reasonable fixed rate. Assume that a reasonable fixed rate of interest is five percent because this rate, in combination with the 200 basis points (two percent) per year of deferred interest in years six through ten, produces a yield that approximates the applicable Federal rate. The constant yield method is applied as if the debt instrument provided for stated interest at five percent for the initial five years and stated interest at seven percent for the final five years (of which 200 basis points is not qualified stated interest), with a corresponding yield of 5.86 percent, compounded annually. The yearly OID accruals attributable to the deferred interest are described below:

Year	Assumed payments	Adjusted issue price beginning	OID	Assumed qualified stated interest	Adjusted issue price ending
1994	\$5,000	\$100,000.00	\$858.62	\$5,000	\$100,858.62
1995	5,000	100,858.62	908.92	5,000	101,768.54
1996	5,000	101,768.54	962.17	5,000	102,729.71
1997	5,000	102,729.71	1,018.54	5,000	103,748.25
1998	5,000	103,748.25	1,078.21	5,000	104,826.47
1999	7,000	104,826.47	1,141.38	5,000	103,967.85
2000	7,000	103,967.85	1,091.08	5,000	103,058.93
2001	7,000	103,058.93	1,037.83	5,000	102,096.76
2002	7,000	102,096.76	981.48	5,000	101,078.21
2003	107,000	101,078.21	921.79	5,000	0
			10,000.00		

Example 4. Variable rate debt instrument with an initial qualified floating rate and deferred interest—(i) Facts. On January 1, 1994, C purchases at original issue, for

\$100,000, D corporation's debt instrument that matures on December 31, 2003, and has a stated principal amount of \$100,000, payable at maturity. The debt instrument

provides for annual payments of interest on December 31 of each year, beginning on December 31, 1994. For the first five years, the interest rate is the value of one-year

LIBOR on each payment date less 100 basis points (one percent). For the subsequent five years, the interest rate is the value of one-year LIBOR on each payment date plus 200 basis points (two percent).

(ii) *Determination of deferred interest.* The debt instrument is a variable rate debt instrument. Interest on the debt instrument is stated at a qualified floating rate followed by another qualified floating rate. Under paragraph (f)(2) of this section, the variable rate debt instrument has deferred interest equal to 300 basis points (three percent) per year for years six through ten. Under paragraph (e) of this section, payments based

on a rate equal to one-year LIBOR less 100 basis points (one percent) are qualified stated interest payments.

(iii) *Accrual of deferred interest.* Under paragraph (g)(3) of this section, the amount of deferred interest allocable to an accrual period is determined using the constant yield method. A reasonable application of the constant yield method is to disregard all qualified stated interest on the variable rate debt instrument and assume that the instrument provides for qualified stated interest at a reasonable fixed rate. Assume that a reasonable fixed rate of interest is five percent because this rate, in combination

with the 300 basis points (three percent) per year of deferred interest in years six through ten, produces a yield that approximates the applicable Federal rate. The constant yield method is applied as if the debt instrument provided for stated interest at five percent for the initial five years and stated interest at eight percent for the final five years (of which 300 basis points is not qualified stated interest), with a corresponding yield of 6.27 percent, compounded annually. The yearly OID accruals attributable to the deferred interest are described below:

Year	Assumed payments	Adjusted issue price beginning	OID	Assumed qualified stated interest	Adjusted issue price ending
1994	\$5,000	\$100,000.00	\$1,273.57	\$5,000	\$101,273.57
1995	5,000	101,273.57	1,353.47	5,000	102,627.04
1996	5,000	102,627.04	1,438.38	5,000	104,065.42
1997	5,000	104,065.42	1,528.62	5,000	105,594.03
1998	5,000	105,594.03	1,624.52	5,000	107,218.55
1999	8,000	107,218.55	1,726.43	5,000	105,944.98
2000	8,000	105,944.98	1,646.53	5,000	104,591.51
2001	8,000	104,591.51	1,561.62	5,000	103,153.13
2002	8,000	103,153.13	1,471.38	5,000	101,624.52
2003	108,000	101,624.52	1,375.49	5,000	0
			15,000.00		

Example 5. Variable rate debt instrument with interest paid at maturity. On January 1, 1994, A lends B \$100,000 in exchange for B's note having an issue price of \$100,000 repayable in ten years. Interest compounds on June 30 and December 31 of each year, at a rate equal to the Federal short-term rate in effect on the compounding date, but the payment of interest is deferred until maturity. Assume that on June 30, 1994, the Federal short-term rate for that date is 5 percent, compounded semiannually. Because the stated interest is not payable at least annually, the stated interest is not qualified stated interest and its accrual is determined under paragraph (g)(2) of this section. The amount of OID that accrues under the debt instrument for the first semiannual accrual period is \$2,500.

Shirley D. Peterson,

Commissioner of Internal Revenue.

[FR Doc. 92-30431 Filed 12-21-92; 8:45 am]

BILLING CODE 4830-01-M

Between the Environmental Protection Agency and the Nuclear Regulatory Commission Concerning Clean Air Act Standards for Radionuclide Releases from Facilities other than Nuclear Power Reactors Licensed by NRC or its Agreement States. This MOU was supposed to be published as an attachment to the Proposed Rule to Rescind subpart I for Facilities Other than Nuclear Power Reactors, which was published on December 1, 1992, 57 FR 56877; however, the MOU was accidentally omitted from publication in the Federal Register.

The proposal to rescind subpart I for NRC licensees other than nuclear power reactors was issued pursuant to section 112(d)(9) of the Clean Air Act, which allows the EPA to decline to regulate NRC licensees if the Administrator determines by rule that the NRC regulatory program provides an ample margin of safety to protect the public health. The proposal to rescind is based on an extensive survey of these licensees which found that all surveyed facilities are presently in compliance with the quantitative emission limit in subpart I and on commitments made by NRC in the MOU with EPA.

FOR FURTHER INFORMATION CONTACT: Fran Jones, Air Standards and Economics Branch, Criteria and Standards Division, Office of Radiation and Indoor Air (6602J), Environmental Protection Agency, Washington, DC 20460, (202) 233-9229.

Dated: December 11, 1992.

Michael Shapiro,

Acting Assistant Administrator, Air and Radiation.

Memorandum of Understanding Between the Environmental Protection Agency and Nuclear Regulatory Commission Concerning Clean Air Act Standards for Radionuclide Releases from Facilities Other Than Nuclear Power Reactors Licensed by NRC or Its Agreement States

Subpart I, 40 CFR Part 61

In accordance with sections 112(d)(9) and 122(c)(2) of the Clean Air Act, as amended in 1990, and in order to minimize regulatory duplication and conserve resources in the control of radionuclide emissions to air from facilities other than nuclear power reactors, licensed by the Nuclear Regulatory Commission (NRC) or its Agreement States under the Atomic Energy Act of 1954, as amended, NRC and the Environmental Protection Agency (EPA) agree as follows:

General Goal of Agreement

EPA and NRC are entering into this MOU to ensure that facilities other than nuclear power reactors, licensed by the NRC, will continue to limit air emissions of radionuclides to levels that result in protection of the public health with an ample margin of safety. The guiding objective is that the actions under this MOU provide assurance that

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL-4547-3]

National Emissions Standards for Hazardous Air Pollutants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; correction.

SUMMARY: EPA is publishing a Memorandum of Understanding (MOU)

public health is being and will continue to be protected with an ample margin of safety.

NRC will ensure that facilities licensed by Agreement States will also continue to limit air emissions of radionuclides to levels that result in protection of the public health with an ample margin of safety. NRC will accomplish this through its established procedures for continuous oversight of Agreement States' radiation control programs. Under the Atomic Energy Act, as amended, NRC is required to periodically review Agreement State programs for adequacy and compatibility with NRC's programs. Routine reviews are complete, in-depth examinations of Agreement State regulatory programs and are conducted every other calendar year. NRC review visits are usually conducted between routine reviews and maintain familiarity with the Agreement State program. Through this established process, NRC can provide adequate assurance that Agreement State-licensed facilities will continue to provide an ample margin of safety in protecting the public from air emissions of radionuclides.

NRC Lead Actions

1. NRC agrees to develop and issue a regulatory guide on designing and implementing a radiation protection program to ensure that doses resulting from effluents from licensed facilities will remain as low as is reasonably achievable (ALARA). The guide will establish a specific goal of 10 millirem per year total effective dose equivalent to the maximally exposed individual from radionuclide air emissions from licensed facilities and operations. The guide will also describe the types of administrative programs and objectives for environmental radiation protection programs that the NRC staff finds to be acceptable in satisfying the requirement in 10 CFR 20.1101(b).

The regulatory guide will be published for public comment and will be revised in response to comments, as appropriate, prior to finalization. NRC will publish a draft of the regulatory guide in October 1992, and after public comments have been incorporated, issue a final guide by April 1993. Once compliance with the revised 10 CFR part 20 is mandatory, and the final guide is available, NRC will review licensee compliance with the revised 10 CFR part 20 radiation protection program requirement through license renewals and ongoing inspection efforts. If any licensee fails to comply with the ALARA requirements of the revised 10 CFR part 20 and license conditions, NRC will take enforcement action in

accordance with NRC's Enforcement Policy in Appendix C of 10 CFR part 2.

2. NRC agrees to develop inspection guidance on ALARA considerations for effluents and incorporate ALARA considerations in Standard Review Plans. Thus, license reviewers and inspectors will have comprehensive guidance and review criteria for assessments of ALARA at various licensed facilities. NRC will develop these documents based on the ALARA Regulatory Guide, which will be prepared with the benefit of public comment. NRC intends to complete the inspection guidance and Standard Review Plan shortly after completing the Regulatory Guide on ALARA for environmental effluents of radionuclides.

3. Pursuant to NRC's existing oversight authority for Agreement State programs described in the general goal of this MOU, NRC will work with Agreement States to adopt and implement regulations compatible with NRC's regulations in the revised 10 CFR part 20. These efforts will include maintenance of effluents, including air emissions, at ALARA levels.

4. Five years from the execution of the MOU, NRC will undertake a survey of a subset of NRC-licensees to verify that the NRC regulatory program is continuing to provide an ample margin of safety.

EPA Lead Actions

1. By November 15, 1992, EPA will develop and publish in the Federal Register a Notice of Proposed Rulemaking, pursuant to its authority under Clean Air Act Section 112(d)(9), to rescind its existing regulations in 40 CFR part 61, subpart I, as applied to licensed facilities other than nuclear power reactors. This proposal, which will occur only if the purposes and provisions of this MOU are proceeding effectively, requires that the Administrator find that the regulatory program implemented by NRC will protect public health with an ample margin of safety. It is expected, subject to public notice and comment, that the basis for this finding will ultimately be provided through the final report of EPA's survey of NRC and Agreement State licensees and through implementation of the commitments of this MOU. Final action on the rulemaking will be taken as soon as practicable after completion of the Notice of Proposed Rulemaking to rescind subpart I, as described in this paragraph.

2. In anticipation of issuance of the proposed rescission of 40 CFR part 61, subpart I for licensed facilities other

than nuclear power reactors, EPA will propose a rule to further stay the effectiveness of subpart I for these facilities during the pendency of the rulemaking on rescission. The final rule staying the effectiveness of subpart I will be issued on or before the date EPA proposes rescission and is contingent upon the provisions of this MOU proceeding effectively.

Effective Date, Revision, and Termination

This memorandum shall be effective immediately and shall continue in effect until revised by mutual agreement, unless terminated by any party after 120 days notice in writing.

Dated: August 28, 1992.

Nuclear Regulatory Commission.

Robert M. Bernero,

Director, Office of Nuclear Material Safety and Safeguards.

Dated: September 4, 1992.

Environmental Protection Agency.

William G. Rosenberg,

Assistant Administrator for Air and Radiation.

[FR Doc. 92-30994 Filed 12-21-92; 9:45 am]

BILLING CODE 6560-60-111

COMMISSION ON NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2500, 2501, 2502, 2503, 2504, 2505, and 2506

National and Community Service Grant Programs; Amendments

AGENCY: Commission on National and Community Service.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission on National and Community Service proposes to amend its regulations concerning the programs authorized by the National and Community Service Act of 1990, as amended. The majority of these proposed changes reflect Congressional amendments to our original Act, while others result from experience gained from our first year of grant-making. The changes concern definitions, selection criteria, eligibility for grant awards and program participation, confidentiality of information about participants, and the amount of post-service benefits in the National Service Program. The Commission feels that these proposed amendments to its regulations will contribute to an easier grant process, from the perspective of both prospective grantees and the Commission.

DATES: Comments must be received on or before January 5, 1993.

ADDRESSES: Comments should be sent to Terry Russell, Commission on National and Community Service, 529 14th Street, NW., suite 452, Washington, DC 20045.

FOR FURTHER INFORMATION CONTACT: Terry Russell at (202) 724-0600.

SUPPLEMENTARY INFORMATION: These proposed rule changes would amend 45 CFR chapter XXV to clarify the definition of administrative costs, reflect Congressionally mandated changes to the Commission's enabling legislation, and provide the Commission the freedom to make changes in program focus or emphasis through application forms and notices of availability of funds in the Federal Register.

Administrative Costs

Under our Act and regulations, only 5% of Commission funds provided a grantee may be used for "administrative costs." Since our Act does not define administrative costs, the Commission provided a definition in its regulations. Consistent with the Commission's desire that program funds not pay for indirect costs, applicants in our first year of operation were advised that although indirect costs could be included in the match requirement, they could not be included in administrative costs unless they were directly apportioned to the program to be funded by the Commission. This proved problematic, especially for institutions of higher education, since their accounting systems were geared to determining indirect costs, and not "administrative costs."

The Commission desires to simplify as much as possible the administrative burdens on its grantees. Therefore the Commission proposes to modify the definition of administrative costs to include indirect costs in order to reflect the realities of accounting systems of many grantees that already classify "administrative costs" as indirect costs.

Conservation and Youth Service Corps

Technical amendments to the National and Community Service Act of 1990 (Pub. L. 102-384) call for three changes in the regulations with respect to Conservation and Youth Service Corps. First, in § 2500.2 paragraph (36) the time frame during which summer youth corps programs can be funded by the Commission has been expanded from June through August to April 30 through October 1.

Second, § 2503.1 is expanded to allow the Commission to fund part-time as well as full-time corps. During our first year of operation, we had numerous requests from corps for funding of part-time corps.

Third, in § 2503.21 the lower age limit for participation in summer programs is lowered from 15 to 14 years of age in order to include all high school students.

Program Focus and Emphasis

In its first year, the Commission awarded grants to a number of different types and models of programs, leaving others that the Commission was unable to fund, due either to lack of funds or lack of qualifying applications. The Commission also found that certain program elements or focuses were particularly beneficial. As a result, in its second year the Commission has elected to emphasize certain types of programs, or provide examples, as in Subtitle D. These should provide helpful guidance to applicants by narrowing somewhat the focus of grant awards.

In order to avoid confusion caused by having criteria for funding and program emphases partially described in the regulations and partially in applications and other notices, it has been determined that all criteria should be published in one place. The Commission, like other government agencies, does not wish to delineate the criteria for awarding grants too specifically in its regulations. Therefore the Commission proposes to modify the Criteria for Funding in §§ 2501.16, 2502.5, 2503.4, 2504.13 by referring to more specific information about program criteria, focuses, and emphases in notices of availability of funds in the Federal Register and in grant applications. Statutory criteria will, of course, continue to apply and will be referred to in notices of availability of funds and the Commission's application forms, as will the Commission's criteria of quality, innovation, replicability and sustainability.

National Service (Subtitle D) Post-Service Benefits

In accordance with the Higher Education Amendments of 1992 (Pub. L. 102-325), § 2504.10 now provides that the non-transferable post-service benefits of \$2500 per year of full-time service shall be increased in conjunction with increases in the maximum Pell grant each year.

Assistance for Head Start

In accordance with the technical amendments, § 2505.41 is amended to expand the eligibility criteria for grant awards under Head Start to include organizations working under memoranda of agreement with ACTION as well as organizations who have received grants from ACTION to operate Foster Grandparent programs.

Confidentiality of Information

Also due to changes made by the technical amendments, regulations concerning the confidentiality of information acquired about participants through evaluation are modified (§ 2506.8). All information about individuals will still be kept confidential except in the case of prior written consent by the participant concerned. Disclosure of information about participants in the aggregate will be permitted.

List of Subjects

45 CFR Part 2500:

Grant programs—Social programs, Organization and functions.

45 CFR Part 2501

Grant programs—Social programs, Elementary and secondary education.

45 CFR Part 2502

Grant programs—Social programs, Colleges and universities.

45 CFR Part 2503

Grant programs—Social programs, Youth.

45 CFR Part 2504

Grant programs—Social programs, Community development block grants, Community action programs.

45 CFR Part 2505

Grant programs—Social programs, Community development.

45 CFR Part 2506

Grant programs—Social programs, Grants administration.

For the reasons set forth in the preamble, the Commission on National and Community Service proposes to amend Chapter XXV, parts 2500-2506, in title 45 of the Code of Federal Regulations to read as follows:

1. The authority citation for Chapter XXV continues to read as follows:

Authority: 42 U.S.C. 12501 et seq.

2. Section 2500.2 is amended by revising paragraphs (a)(2) and (a)(36) to read as follows:

§ 2500.2 Definitions.

* * * * *

(a) * * *

(2) *Administrative Costs or expenses* include: costs associated with overall program administration; salaries and benefits for directors and administrative staff of existing organizations that sponsor funded programs; and insurance that protects the grantee (e.g., liability insurance). Non-administrative (direct service) Costs include: costs

relating to service delivery (services that directly benefit participants); salaries and benefits of staff who train, place, and supervise such staff; costs of providing living allowances and usual in-service education and training for participants; and evaluation of the program as required by the terms and conditions of the grant. Particular costs charged to the program might be prorated (with documentation) between direct services and administration. Indirect costs may be included in administrative costs.

(36) *Summer Program* means a youth corps program authorized under this chapter that is limited to the period beginning after April 30 and ending before October 1.

2. Section 2501.16 is revised to read as follows:

§ 2501.16 Criteria for funding.

All criteria for funding can be found in the National and Community Service Act of 1990, as amended, (42 U.S.C. 12525 (a) & (b)). The grant application itself will also refer to the statutory criteria and delineate additional criteria for the selection process.

3. section 2502.5 should be revised to read as follows:

§ 2502.5 Criteria for evaluating applications.

All criteria for funding can be found in the National and Community Service Act of 1990, as amended, (42 U.S.C. 12531). The grant application itself will also refer to the statutory criteria and delineate additional criteria for the selection process.

4. Section 2503.1 should be revised to read as follows:

§ 2503.1 Purpose.

The purpose of this program is to provide grants for the creation or expansion of full-time, part-time, summer and year-round youth service or conservation corps programs, including grants for the addition of participants, an increase in the number of hours or weeks during which the program operates, the involvement of an existing program in new types of service, or the improvement of an existing program consistent with this part.

5. Section 2503.4 is revised to read as follows:

§ 2503.4 Selection criteria.

All criteria for funding can be found in the National and Community Service act of 1990, as amended, (42 U.S.C. 12541-12555). The grant application

itself will also refer to the statutory criteria and delineate additional criteria for the selection process.

6. Section 2503.21(a)(1)(i) is revised to read as follows:

§ 2503.21 Age, citizenship, and other criteria for enrollment.

(a) * * *

(1) * * *

(i) Not less than 16 years nor more than 25 years of age, except that summer programs may include individuals not less than 14 years of age nor more than 21 years of age at the time of enrollment of such individuals; and

7. Section 2504.10 is amended by revising paragraph (b)(1) to read as follows:

§ 2504.10 Value of post-service benefits.

(b)(1) The Commission, through the State, shall annually provide to each full-time participant a non-transferable post-service benefit for each year of service that such participant provides to the program, which benefit shall be equal in value to \$2,500 for each such year, and which benefit shall be adjusted to match any increases in the maximum Pell Grant as provided by the annual appropriation. Funds for this benefit shall be included in the budget for the program and reflected in the grant request.

8. Section 2504.13 is revised to read as follows:

§ 2504.13 Criteria for evaluating applications.

All criteria for funding can be found in the National and Community Service Act of 1990, as amended, (42 U.S.C. 12572 (a) & (b)). The grant application itself will also refer to the Statutory criteria and delineate additional criteria for the selection process.

9. Section 2505.41 is revised to read as follows:

§ 2505.41 Eligibility.

Only those organizations which have a grant from ACTION, the Federal Domestic Volunteer Agency, to operate a Foster Grandparent program, or those organizations operating under memoranda of agreement with ACTION, are eligible to receive awards.

10. Section 2506.8 is amended by revising paragraph (d) to read as follows:

§ 2506.8 Program evaluation.

(d) The Commission shall keep confidential the information acquired

about individual participants or members of control groups from evaluations under paragraph (c) of this section, except that

(1) The content of any information described in (d) may be disclosed with the prior written consent of the individual participant with respect to whom the information is maintained; and that

(2) The Commission may disclose information about the aggregate characteristics of such participants.

Dated: December 14, 1992.

Catherine Milton,
Executive Director.

[FR Doc. 92-30594 Filed 12-21-92; 8:45 am]

BILLING CODE 6820-BA-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[CC Docket No. 92-466]

MSS Above 1 GHz Negotiated Rulemaking Committee

AGENCY: Federal Communications Commission.

ACTION: Notice of advisory committee establishment and meetings.

SUMMARY: The Federal Communications Commission has established the MSS Above 1 GHz Negotiated Rulemaking Committee (Committee). The Committee will provide expert advice and recommendations on technical matters related to the establishment and regulation of a mobile satellite service in the 1610-1626.5/2483.5-2500 MHz frequency bands. The establishment of this Committee is necessary and is in the public interest.

In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice also advises interested persons of the initial and proposed subsequent meetings of the Committee.

DATES:

Wednesday, January 6, 1993, at 9:30 a.m.

Tuesday, January 12, 1993, at 9:30 a.m.

Tuesday, January 26, 1993, at 9:30 a.m.

Wednesday, February 3, 1993, at 9:30 a.m.

Monday, February 8, 1993, at 9:30 a.m.

Wednesday, February 17, 1993, at 9:30 a.m.

Thursday, February 25, 1993, at 9:30 a.m.

Wednesday, March 3, 1993, at 9:30 a.m.

Tuesday, March 9, 1993, at 9:30 a.m.

Thursday, March 18, 1993, at 9:30 a.m.

Wednesday, March 24, 1993, at 9:30 a.m.

Tuesday, March 30, 1993, at 9:30 a.m.

ADDRESSES: Federal Communications Commission, 1919 M Street NW., room 856, Washington, DC 20554.

SUPPLEMENTARY INFORMATION: The Committee was established by the Federal Communications Commission to bring together applicants, existing users of the frequency bands, and other affected entities, to discuss and to recommend approaches to resolve technical sharing and coordination issues involved in the establishment and regulation of a new satellite service. The FCC has solicited nominations for membership on the Committee pursuant to the Negotiated Rulemaking Act of 1990, Public Law 101-648, November 28, 1990, and will select members to achieve a balanced membership given the purposes and objectives of the Committee. See Public Notice in CC Docket No. 92-166, 57 FR 39661 (September 1, 1992), 7 FCC Rcd 5241 (1992).

The agenda for the first meeting is as follows:

1. Introductory Comments: Gerald P. Vaughan, Deputy Chief Common Carrier Bureau; Thomas S. Tycz, Designated Federal Officer and Deputy Chief, Domestic Facilities Division
2. Selection of Facilitator
3. Approval of Agenda
4. Committee Charter
5. Committee Membership
6. Work Program
 - Tasks
 - Schedule
 - Report
7. Organization of Work
 - Identification of Available Information
 - Informal Working Groups
8. Agenda for Next Meeting
9. Other Business

At subsequent meetings, the Committee will seek to determine and to recommend approaches to resolve the domestic sharing problems among the applicants and to resolve potential coordination problems with existing users of the spectrum and with users in adjacent frequencies. The Committee will also discuss international sharing and coordination issues.

Members of the general public may attend the meetings. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, Staff Attorney, Satellite Radio Branch, before each meeting.

FOR FURTHER INFORMATION CONTACT: Kathleen A. Campbell, Administrative

Assistant of the MSS Above 1 GHz Negotiated Rulemaking Committee, at (202) 634-1952.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-30927 Filed 12-21-92; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 92-291, RM-8133]

Radio Broadcasting Services; Cambridge and St. Michaels, MD

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by C.W.A. Broadcasting, Inc., proposing the reallocation of Channel 232A from Cambridge, Maryland, to St. Michaels, Maryland, and modification of the construction permit for Station WFBR(FM) to specify Channel 232A at St. Michaels. The coordinates for Channel 232A at St. Michaels are 38-49-17 and 76-17-27.

DATES: Comments must be filed on or before February 4, 1993, and reply comments on or before February 19, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Charles W. Adams, Jr., President, C.W.A. Broadcasting, Inc., 35 Solomon's Island Road, Annapolis, Maryland 21401.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 92-291, adopted November 25, 1992, and released December 14, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, 1990 M Street, NW., suite 640, Washington, DC 20036, (202) 452-1422.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter

is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 92-30902 Filed 12-21-92; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 92-293, RM-8128]

Radio Broadcasting Services; Stillwater, OK

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Kenneth R. Greenwood seeking the allotment of Channel 251A to Stillwater, Oklahoma, as the community's third local commercial FM service. Channel 251A can be allotted to Stillwater in compliance with the Commission's minimum distance separation requirements with a site restriction of 9 kilometers (6 miles) northwest to avoid a short-spacing to Stations KMOD-FM, Channel 248C, and KVOO-FM, Channel 253C, Tulsa, Oklahoma. The coordinates for Channel 251A at Stillwater are North Latitude 36-09-27 and West Longitude 97-09-20.

DATES: Comments must be filed on or before February 4, 1993, and reply comments on or before February 19, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Brent Weingardt, Esq., Consultants, Inc., 4500 West Virginia Avenue, NW., Bethesda, Maryland 20814 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92-293, adopted November 30, 1992.

and released December 14, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1990 M Street NW., suite 640, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.
Federal Communications Commission.
Michael C. Ruger,
Chief, Allocations Branch, Policy and Rules
Division, Mass Media Bureau.
[FR Doc. 92-30928 Filed 12-21-92; 8:45 am]
BILLING CODE 6712-01-M

47 CFR Part 73

(MM Docket No. 92-294, RM-8129)

Radio Broadcasting Services; Seaside, OR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Ken's Corporation seeking the allotment of Channel 255A to Seaside, Oregon, as the community's second local FM service. Channel 255A can be allotted to Seaside in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4 miles) southwest to avoid a short-spacing to Station KEZX-FM, Channel 255C, Seattle, Washington, at coordinates North Latitude 45-59-15 and West Longitude 124-00-34. Canadian concurrence in the allotment is required since Seaside is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

DATES: Comments must be filed on or before February 4, 1993, and reply

comments on or before February 19, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Margaret L. Tobey, Esq., Akin, Gump, Hauer & Feld, L.L.P., 1333 New Hampshire Avenue, NW., suite 400, Washington, DC 20036 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92-294, adopted November 30, 1992, and released December 14, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1990 M Street, NW., suite 640, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.
Federal Communications Commission.
Michael C. Ruger,
Chief, Allocations Branch, Policy and Rules
Division, Mass Media Bureau.
[FR Doc. 92-30929 Filed 12-21-92; 8:45 am]
BILLING CODE 6712-01-M

GENERAL SERVICES ADMINISTRATION

48 CFR Part 6101

Amendments to GSA Board of Contract Appeals Rules of Procedure

AGENCY: Board of Contract Appeals, GSA.

ACTION: Request for comments.

SUMMARY: This notice invites written comments on proposed amendments to the rules of procedure of the GSA Board of Contract Appeals, which will govern all proceedings before the Board. These include protests of procurements involving acquisitions of automatic data processing (ADP) equipment and services, and contract disputes. The amendments are intended to clarify the Board's existing rules of procedure, as well as to increase the efficiency of proceedings at the Board. The rules have not been amended since June 1985, shortly after the Board first began hearing ADP protests. The Board intends to issue final, revised rules after considering all comments to the proposed amendments.

DATES: Comments must be submitted on or before February 12, 1993.

ADDRESSES: Copies of the proposed rules may be obtained from and written comments submitted to: Office of the Clerk of the Board, c/o Ms. Beatrice Jones, GSA Board of Contract Appeals, 18th & F Streets, NW., Washington DC 20504. (202) 501-0116.

FOR FURTHER INFORMATION CONTACT: Wilbur T. Miller, Chief Counsel, GSA Board of Contract Appeals. (202) 501-0890.

SUPPLEMENTARY INFORMATION:

A. Background

Section 2713 of the Competition in Contracting Act of 1984, 40 U.S.C. 759(f), provides that protests involving ADP procurements may be filed with the Board. The Act also provides that the Board is to adopt and issue rules and procedures necessary for the expeditious resolution of such protests. In addition, the Administrator of General Services has delegated to the Board the authority to adopt and issue rules necessary for the resolution of contract disputes under the Contract Disputes Act of 1978, 41 U.S.C. 601-613. The proposed rules have been approved by majority vote of the Board's members.

B. Regulatory Flexibility Act

The General Services Administration certifies that these proposed revisions will not have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed revisions do not impose recordkeeping or information collection requirements, or collection of information from

offerors, contractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501 et seq.

List of Subjects in 48 CFR Part 6101

Administrative Practice and Procedure, Government Procurement.

Dated: December 14, 1992.

Vincent A. LaBella,

Acting Chairman and Chief Judge, GSA Board of Contract Appeals.

[FR Doc. 92-30696 Filed 12-21-92; 8:45 am]

BILLING CODE 6620-AL-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Chapter III

[FHWA Docket No. MC-92-33]

Zero-Based Review of the Federal Motor Carrier Safety Regulations; Additional Public Outreach Session

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of public outreach session; request for comments; closing of public docket.

SUMMARY: In September 1992, the FHWA successfully completed an initial series of four public outreach sessions in St. Paul, Minnesota; Portland, Oregon; San Antonio, Texas; and Los Angeles, California, pursuant to the notice published in the *Federal Register* on August 18, 1992 (57 FR 37392). On November 6, 1992 (57 FR 53089), the FHWA announced six additional public outreach sessions in Albany, New York; Atlanta, Georgia; Albuquerque, New Mexico; Casper, Wyoming; Kansas City, Missouri; and Washington, DC, to obtain comments and recommendations for improvement of the Federal Motor Carrier Safety Regulations (FMCSRs) as they relate to the commercial motor carrier industry.

This notice announces one additional public outreach session to be held January 20, 1993. This outreach session will be held in conjunction with the United Bus Owners of America (UBOA)/ American Bus Association (ABA) Bus Expo. The outreach sessions are an essential part of FHWA's zero-base regulatory review project. The zero-base review is intended to develop a performance-based regulatory system that will best enhance commercial motor vehicle safety. These sessions will be held to obtain information, views, and opinions from representatives of the motor carrier industry and other interested persons. The FHWA will continue to accept

written comments on the zero-base program until April 1, 1993. After the comment period has closed and the comments have been analyzed, the FHWA will continue the rulemaking process with the goal of developing a regulatory structure that is more performance-oriented.

DATES: Written comments must be received on or before April 1, 1993. The outreach session will be held from 1:30 p.m. to 5:30 p.m., local time, on January 20, 1993.

ADDRESSES: Submit written, signed comments to FHWA Docket MC-92-33, room 4232, HCC-10, Office of the Chief Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except legal Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

The outreach session will be held at the following location: Hyatt Regency Downtown Miami, 400 SE Second Avenue, Miami, Florida 33131, 305/358-1234.

FOR FURTHER INFORMATION CONTACT: Ms. Paula R. Robinson, telephone (202) 366-2984, or Mr. Robert Redmond, telephone (202) 366-5014, Federal Highway Administration, Office of Motor Carriers, 400 Seventh Street, SW., room 3404, Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays. In advance of the session, all individuals desiring to appear or planning to present information should contact Mr. Stan Hamilton, Office of Motor Carriers, telephone (202) 366-0665.

SUPPLEMENTARY INFORMATION: The Federal Motor Carrier Safety Regulations were enacted under the Motor Carrier Act of 1935, Ch. 498, 49 Stat. 546 (codified as amended at 49 U.S.C. 3102 and 3104). The regulations have been incrementally modified ever since. The authority for the current regulations has been vested in the Department of Transportation since 1966 (49 U.S.C. 1655(e)). All private, exempt commodity, common, and contract motor carriers of property and all for-hire carriers of passengers, as defined in the FMCSRs, are currently subject to these regulations. Additionally, the FHWA has proposed making private motor carriers of passengers subject to certain minimum safety requirements (54 FR 7362; notice of proposed rulemaking (1989)).

The FHWA recently completed a review of the FMCSRs in accordance with the President's January 28, 1992, Memorandum to Heads of Certain Executive Departments and Agencies to identify and eliminate any unnecessary regulatory burdens. Having completed that review, the FHWA believes it is appropriate to reconsider the underlying basis for all safety rules and to identify a performance-oriented regulatory structure that would enhance safety while minimizing the burdens placed on industry.

The FHWA believes the motor carrier industry will benefit from a regulatory structure that is more performance-oriented as opposed to prescriptive. Many of the basic provisions of the FMCSRs have remained unchanged for more than 50 years while others have been amended numerous times. The FHWA believes this has led to a set of regulations which can be difficult to understand and enforce. The FHWA plans to use the comments and recommendations gathered from all outreach sessions as the foundation to develop a comprehensive, unified set of performance-oriented safety requirements designed to ensure maximum safety on the Nation's highways. Discussion at the sessions will focus on identifying "who," "what," and "how" the FHWA should regulate commercial motor carriers and drivers to improve highway safety.

The goals and objectives of the zero-base review project are to: (1) Focus on those areas of enforcement and compliance which are most effective in reducing motor carrier accidents; (2) reduce compliance costs; (3) encourage innovation; (4) clearly and succinctly describe what is required; and (5) facilitate enforcement. The resulting regulatory system would apply to all appropriate segments of the motor carrier industry and would be enforceable by Federal, State and local authorities.

The performance-based regulations would be responsive to the needs of the industry and would enhance the safe operation of commercial motor vehicles.

Concurrent with the outreach effort, the FHWA has opened a public docket, MC-92-33, to allow commenters and interested parties who might be unable to attend the outreach sessions the opportunity to respond to the zero-base effort.

(23 U.S.C. 315; 49 CFR 1.48)

Issued on: December 14, 1992.

T.D. Larson,
Administrator.

[FR Doc. 92-31007 Filed 12-21-92; 8:45 am]

BILLING CODE 4010-22-M

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR PART 826

Equal Access to Justice Act Fees

AGENCY: National Transportation Safety Board.

ACTION: Notice of proposed rule and request for comment.

SUMMARY: The NTSB is proposing to adopt a cost-of-living adjustment to the standard \$75 cap for the calculation of attorneys fees permitted under the Equal Access to Justice Act (EAJA). The agency proposes to use the Bureau of Labor Statistics Consumer Price Index for All Urban Consumers, All Items, as the inflator. It intends that the cap may be inflated to the year of the provision of service by an inflation factor equal to the ratio of the index for the year of service over the index for the base year. The agency requests comments on this methodology.

DATES: Comments are invited by January 21, 1992.

ADDRESSES: An original and two copies of any comments must be submitted to: Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East, SW., Washington, DC 20594, Attention: EAJA Rules.

Comments may be inspected at the above address, Room 6333, from 8 a.m. to 5 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jane F. Mackall, (202) 382-1952.

SUPPLEMENTARY INFORMATION: The NTSB currently has rules, at 49 CFR part 826, that specify the procedures and standards that govern applications for attorneys fees and expenses in proceedings arising out of the Board's jurisdiction to hear appeals from actions taken by the Administrator of the Federal Aviation Administration. To the extent that fees and expenses are available in these proceedings, the awards are the result of the enactment in 1981 (and subsequent permanent reenactment in 1985) of the Equal Access to Justice Act, the relevant portion of which is codified at 5 U.S.C. 504. EAJA, as it is commonly called, was designed to diminish the deterrent effect of high legal costs on challenges to unjustified legal action by the government, though the Act was not designed to reimburse fees, even reasonable fees, without limit. The Act provides that, where fees are awarded, they shall be based on prevailing market rates for the kind and quality of service furnished, but that they shall not be awarded in excess of \$75 per hour

unless the agency determines by regulation that an increase in the cost of living or some special factor justifies a higher fee.

It is beyond dispute that a \$75 fee cap would not have permitted full recovery of all attorneys fees even in 1981, and this was understood by Congress. Yet, to the extent that the value of the capped amount has diminished in real terms over time, so too is diminished the subsidy's ability to act as an inducement to a citizen to pursue vindication of legal rights against improper government action. There is no reason to believe that Congress intended an inflation-driven erosion of the utility of its enactment. It is, therefore, the purpose of this rulemaking to restore the original vitality of the EAJA process in NTSB procedures.

This agency has received several petitions requesting an adjustment to the EAJA fee cap.¹ Our inaction on these petitions has been based, in part, on the fact that no other agency had taken the opportunity afforded by clear statutory language to offer an inflation-based adjustment to the original cap. (The Administrative Conference of the United States, which has been charged by Congress with oversight of agency practice under EAJA, reported in 1991 that no agency had even initiated a fee adjustment rulemaking.) However, when EAJA was enacted its provisions were made simultaneously effective for agency and court proceedings alike. Perhaps because of their experience with other fee shifting arrangements, the courts have never hesitated to authorize cost-of-living based adjustment to the \$75 cap. As the erosion of inflation compounds over time, we think that it has become imperative to follow the lead of the courts and announce by rule an inflation-based adjustment to our cap. As one court put it:

Congress, by specifying the market rate for fees * * * intended to ensure that adequate representation would be available * * * for oftentimes "a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." * * * Congress did not think, however, that extraordinary fees were needed to ensure adequate representation; consequently, it limited public reimbursement * * * to \$75 per hour * * * Congress was aware, however, that increases in the cost of living (inflation)

¹ Petitions have been filed by Richard B. Thompson, George O. Grant, Harold M. Gey, John W. Cronin, David L. Ebershoff, Mark S. Kahan (on behalf of C and M Airways, Inc. d/b/a Armadillo Air Associates), and Robert V. Stewart. These petitions are granted to the extent discussed in this notice, and they are incorporated into and will be included in the record in this proceeding.

might erode the fee-reimbursement scheme of EAJA; this is evidenced by inclusion in the Act of a cost-of-living escalator * * *. By allowing district courts to adjust upwardly the \$75 cap to account for inflation, Congress undoubtedly expected that the courts would use the cost-of-living escalator to insulate EAJA fee awards from inflation * * *.

Meyer v. Sullivan, 958 F.2d 1029 (11th Cir. 1992) (holding that courts must consider awarding inflation-adjustment fees). Citation omitted.

Reference to several leading court decisions is also informative as to the issues we can expect regarding what the new cap should be. Our examination of these decisions leads us to the view that the new cap should be self-adjusting, that is, based on reference to a known index that can be used prospectively for continual adjustment. We believe that this index should be the Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, U.S. City Average, All Items, unless a more specific geographic index is published for the locality. This "CPI" is the generally understood "cost of living" index that is widely used as a price inflator in labor and contract matters. We recognize that there may be price inflators that are more specifically geared to the cost of legal services, but the statutory language under which we act speaks broadly to inflation adjustment for the cost of living, and we believe Congress must be understood to have said what it meant. See *Sullivan v Sullivan*, 958 F.2d 574 (4th Cir. 1992) (rejecting use of a CPI sub-category geared to legal services).

We also recognize that there could be controversy over the selection of the base year, because Congress has (arguably) twice chosen \$75 as the fee cap, first in 1981 and then again in 1985. Our initial impression, supported by judicial precedent, is that 1981 should be the base, and that is our proposal here. See *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992). Additionally, we believe that the cost-of-living adjustments, if warranted, should be made only up to the year of provision of the service in question. Inflation to the year of decision represents an impermissible interest charge against the government. See *Perales, supra*.

The Board does not now intend to consider by rule any other specific adjustment to the fee cap, although the statute does contemplate that so-called "special factor" considerations must also be addressed by rule. (Our existing rule inexplicably refers to this issue as "special circumstances," a term which is used elsewhere in EAJA with entirely different consequences. We will make

editorial amendment to our rule so that it conforms to the statutory usage.) The Board's experience with its docket does not lead to the conclusion that enforcement cases tried at the administrative level are of the type that warrant a "special factors" exception, at least not one based on considerations so certain of description that they can be captured in a standard rule. However, because of the statutory requirement for a regulation-based exception for special factors—that is, because our administrative law judges may not address this issue solely in the context of specific adjudication—the Board will consider the creation by rule of an additional exception to the standard fees to be exercised in its discretion, if satisfactory parameters for a special factor award can be developed. Given the problematic nature of this undertaking, the Board does not intend to postpone final adoption of a rule in this docket pending resolution of this separate question.

Finally, we do not propose to authorize supplemental filings in cases where EAJA fees have already been the subject of a Board order. We do, however, contemplate allowing petitioners in pending cases to supplement their filings to reflect the proposed standards, and intend any subsequent awards to be premised on the revised standard, if adopted. We caution all applicants to recall that inflation-adjusted rates would be available only after a finding that the prevailing market rate is in excess of \$75.

As required by the Regulatory Flexibility Act, we certify that the proposed rules will not have a substantial impact on a significant number of small entities. What effect they may have, however, would be beneficial to small entities. The rules are not major rules for the purposes of Executive Order 12291. We also conclude that this action will not significantly affect either the quality of the human environment or the conservation of energy resources, nor will this action impose any information collection requirements requiring approval under the Paperwork Reduction Act.

List of Subjects in 49 CFR Part 826

Claims, Equal access to justice, Lawyers.

Accordingly, 49 CFR part 826 is proposed to be amended as set forth below.

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

1. The authority citation for part 826 continues to read as follows:

Authority: Section 203(a)(1) Pub. L. 99-80, 99 Stat. 186 (5 U.S.C. 504).

2. Section 826.6 is proposed to be amended by revising paragraph (b) to read as follows:

§ 826.6 Allowable fees and expenses.

* * * * *

(b)(1) No award for the fee of an attorney or agent under this part may exceed \$75 indexed as follows:

$$\frac{X}{\$75/\text{hr}} = \frac{\text{CPI-New}}{\text{CPI-1981}}$$

The CPI to be used is the CPI, All Urban Consumers, U.S. City Average, All Items, except where a more pertinent local, All Item index is available. The numerator of that equation is the yearly average for the year(s) the services were provided, with each year calculated separately. This formula increases the \$75 statutory cap by indexing it to reflect cost of living increases, as authorized in 5 U.S.C. 504(b)(1)(A)(ii). Application of these increased rate caps requires affirmative findings under § 821.6(c). For ease of application, available U.S. City figures are reproduced as follows:

1981	90.9
1982	96.5
1983	99.6
1984	103.9
1985	107.6
1986	109.6
1987	113.6
1988	118.3
1990	130.7
1991	136.2

(2) No award to compensate an expert witness may exceed the highest rate at which the agency pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

* * * * *

3. Section 826.7 is proposed to be revised to read as follows:

§ 826.7 Rulemaking on maximum rates for attorney fees.

(a) In addition to increases based on cost of living (see § 826.6), attorney fees in some or all of the proceedings covered by this part may also be increased beyond the statutory cap of \$75 if warranted by special factors (such as limited availability of attorneys qualified to handle certain types of

proceedings). The Board will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) any person may file with the Board a petition for rulemaking to increase the maximum rate for attorney fees by demonstrating that a special factor(s) justifies a higher fee. The petition shall identify the rate the petitioner believes the Board should establish and the proceeding(s) or types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Board will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

Issued in Washington, DC on this 14th day of December.

Carl W. Vogt,

Chairman.

[FR Doc. 92-30940 Filed 12-21-92; 8:45 am]

BILLING CODE 7533-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 655

[Docket No. 921221-2321]

Atlantic Mackerel, Squid, and Butterfish Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed initial specifications for the 1993 and 1994 Atlantic mackerel, squid, and butterfish fisheries and request for comment.

SUMMARY: NMFS issues these proposed initial specifications for the 1993 and 1994 fishing years for Atlantic mackerel, squid, and butterfish. Regulations governing these fisheries require the Secretary of Commerce (Secretary) to publish specifications for the upcoming fishing year. This action is intended to fulfill this requirement and promote the development of the U.S. Atlantic mackerel, squid, and butterfish fisheries.

DATES: Public comments must be received on or before January 21, 1993.

ADDRESSES: Copies of the Mid-Atlantic Fishery Management Council's "quota paper" and recommendations are available from John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, room 2115, Federal Building, 300 South New

Street, Dover, DE 19901. Copies of the draft environmental assessment for this action are available from Richard B. Roe, Regional Director, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT:
Myles Raizin, (508) 281-9104 or Richard Seamans, (508) 281-9244.

SUPPLEMENTARY INFORMATION:
Regulations implementing the Fishery Management Plan for Atlantic Mackerel, Squid, and Butterfish Fisheries (FMP) prepared by the Mid-Atlantic Fishery Management Council (Council), appear

at 50 CFR part 655. These regulations stipulate that the Secretary will publish a notice specifying the initial annual amounts of the initial optimum yield (IOY) as well as the amounts for allowable biological catch (ABC) domestic annual harvest (DAH), domestic annual processing (DAP), joint venture processing (JVP), and total allowable levels of foreign fishing (TALFF) for the species managed under the FMP. No reserves are permitted under the FMP for any of these species. Regulations implementing Amendment 4 to the FMP allow the Council to recommend specifications for these

fisheries for up to three consecutive years.

Since an update of the Atlantic mackerel stock assessment will be forthcoming in 1994, the Council has chosen to recommend specifications for 1993 and 1994, only. Procedures for determining the initial annual amounts are found in § 655.22.

The following table contains the proposed initial specifications for Atlantic mackerel, *Loligo* squid, *Illex* squid, and butterfish. These specifications are based on the recommendations of the Mid-Atlantic Fishery Management Council (Council).

TABLE.—PRELIMINARY INITIAL ANNUAL SPECIFICATIONS FOR ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FOR THE FISHING YEARS, JANUARY 1 THROUGH DECEMBER 31, 1993 AND JANUARY 1 THROUGH DECEMBER 31, 1994
(In metric tons (mt))

Specifications	Squid		Atlantic mackerel	Butterfish
	Loligo	Illex		
Max OY ¹	44,000	30,000	² N/A	16,000
ABC ³	44,000	30,000	850,000	16,000
IOY	44,000	30,000	100,000	10,000
DAH	44,000	30,000	⁴ 100,000	10,000
DAP	44,000	30,000	50,000	10,000
JVP	0	0	35,000	0
TALFF	0	0	0	0

¹ Max OY as stated in the FMP;
² Not applicable; see the FMP;
³ IOY can rise to this amount;
⁴ Contains 15,000 mt. projected recreational catch based on the formula contained in the regulations (50 CFR part 655).

Atlantic Mackerel

The FMP provides that ABC in U.S. waters for the upcoming fishing year is that quantity of mackerel that could be caught in U.S. and Canadian waters minus the estimated catch in Canadian waters, while still maintaining a spawning stock size in the year following the year for which catch estimates and quotas are being prepared, equal to or greater than 600,000 mt. Using an estimated spawning stock biomass of 1,500,000 mt and an estimated Canadian catch of 50,000 mt, the Council derived an ABC of 850,000 mt.

The proposed IOY for the 1993 and 1994 Atlantic mackerel fisheries is set at 100,000 mt, equal to the specified DAH. The proposed specification for DAH is computed by adding the estimated recreational catch, the proposed specified DAP, and the proposed specified JVP. The recreational component of DAH is estimated at 15,000 mt using a formula found at § 655.21(b)(2)(ii). DAP and JVP components of DAH are estimated using the Council's annual processor survey. The U.S. processors projected a U.S. production of 46,105 mt for the upcoming fishing year. Based upon responses from the annual processor

survey and inquiries from Estonia, the Council has recommended and the Regional Director proposes a specification of 35,000 mt of JVP for the 1993 and 1994 fisheries. The Council also recommended and the Regional Director proposes a DAP of 50,000 mt yielding a DAH of 100,000 mt, which includes the 15,000 mt recreational component.

Zero TALFF is proposed for the 1993 and 1994 Atlantic mackerel fisheries. The exclusion of directed foreign fishing is recommended by the Council and proposed by the Regional Director as described in the draft environmental assessment. However, the final TALFF specification will also be based on public comment.

The Council used testimony from both the domestic fishing and processing industries and analysis of nine economic factors found at § 655.21(b)(2)(ii) to determine that Atlantic mackerel produced from directed foreign fishing would directly compete with U.S. processed products, thus limiting markets available to U.S. processors. The industry was nearly unanimous in its assessment that a specification of TALFF would impede the continued growth of the U.S. fishery. The Council believes that an

expanding mackerel market and uncertainty regarding world supply, due to the economic and political restructuring in Eastern Europe, may substantially increase opportunities for U.S. producers to increase sales to new markets abroad. Also, the Department of Agriculture has accepted the Department of Commerce's recommendation to include Atlantic mackerel on the list of eligible commodities for fiscal year 1993 under the Agricultural Trade Development and Assistance Act of 1954 (Pub. L. 480). This may provide a market opportunity for U.S. produced Atlantic mackerel.

As a supplement to its regulations, a benefit-cost analysis was prepared by the Council. Results of the analysis indicate that after eight to ten years, a specification of zero TALFF will yield positive benefits to the fishery and to the Nation.

The Council also recommended and the Regional Director proposes four special conditions to be imposed on the 1993 and 1994 Atlantic mackerel fisheries as follows: (1) Joint ventures are allowed, but river herring bycatch south of 37°30' N. latitude may not exceed 0.25 percent of the over-the-side transfers of Atlantic mackerel; (2) the Regional Director should reduce

impacts on marine mammals, whenever possible, in prosecuting the Atlantic mackerel fisheries; (3) IOY may be increased during the year, but the total should not exceed 200,000 mt; and (4) applications from a particular nation for joint ventures for 1993 or 1994 will not be decided on until the Regional Director determines, based on an evaluation of performances, any purchase obligations for 1992 and previous years have been fulfilled.

Atlantic Squids

The maximum OY for *Loligo* is 44,000 mt. The recommended ABC for the 1993 and 1994 fisheries is 44,000 mt, representing an increase of 7,000 mt over the 1992 ABC of 37,000 mt. This level of ABC is based on the most recent stock assessments and is determined to be at a level that will not harm the continued growth of the resource.

An IOY of 44,000 mt, equal to DAH and DAP, is recommended by the Council and proposed by the Regional Director. Since the U.S. industry intends to fully utilize the IOY, there is no opportunity for JVP or TALFF.

Results of the 1992 Council processor survey indicate that the U.S. processing sector plans to process 57,836 mt of *Loligo* in the upcoming year. Therefore, the Council recommends and the Regional Director proposes a DAP of 44,000 mt.

Based on the results of the processor survey, the Council recommended and the Regional Director proposes zero JVP and zero TALFF for the 1993 and 1994 fisheries for *Loligo*. The expansion of the U.S. freezer trawler and refrigerated sea water fleets participating in this fishery, and the substantial increase in U.S. landings, indicate that there is no longer a justification for foreign participation. TALFF and JVP have been absent from this fishery since 1987. Since TALFF and JVP are set at zero, DAH of 44,000 mt equals DAP for the 1993 and 1994 fisheries for *Loligo*. Maximum OY for these fisheries can only be increased by an amendment to the FMP.

The maximum OY for *Illex* squid is 30,000 mt. Based on the best available scientific information, the Council recommended and the Regional Director proposes an ABC of 30,000 mt equal to the maximum OY.

The Council also recommended and the Regional Director proposes that the IOY for *Illex* be set at 30,000 mt because U.S. harvesters intend to utilize the entire IOY. Consequently, there is no TALFF available. No directed foreign fishery has been allowed for *Illex* since 1986. Given the current economic situation, zero TALFF is recommended

by the Council and proposed by the Regional Director.

Based on the 1992 Council processor survey, *Illex* squid processors plan to process 40,737 mt of *Illex* in 1993. Therefore, the DAP for the 1993 fishery is specified at 30,000 mt. This reflects the large increases in the capacity of the east coast freezer trawler fleet and projected increases in the number of vessels using refrigerated seawater systems capable of landing high quality *Illex*. Much of the increase in capacity is a function of a general increase in prices in the range of 20 percent for 1990 and 1991. Prices continue to remain strong in the 1992 fishery. The continued strength in *Illex* prices is related to decreases in world supply including a closing of 30,000 square miles of traditional squid grounds east of the Falklands/Malvinas, a decrease in *Loligo* squid landings in Thailand, and reduction in fishing efforts of Eastern European fleets. Although *Illex* is primarily a bait squid, it has been used as a substitute for *Loligo*, a food squid, in many markets.

Butterfish

The FMP sets the maximum OY for butterfish at 16,000 mt. Based on the most current stock assessments, the Council recommends and the Regional Director proposes an ABC of 16,000 mt for the 1993 and 1994 fisheries, unchanged from the 1992 specification. Commercial landings of butterfish have decreased in the past 3 years from 4,000 mt to 2,285 mt. Estimated landings for the first five months of 1992 were 1,704 mt, up 64 percent from the same period in 1991. Difficulty in locating schools of market-size fish and market limitations have caused severe reductions in both supply of and demand for butterfish. Fishermen and processors feel that the size and fat content of butterfish will improve in the 1993 and 1994 fisheries.

The Council recommended and the Regional Director proposes an IOY for butterfish of 10,000 mt. The U.S. industry intends to fully utilize this IOY. Thus, there is no TALFF available. The Council recommends and the Regional Director proposes a DAH of 10,000 mt based on the Council processor survey of 8,283 mt with an allowance of approximately 2,000 mt for non-responses. There has been no interest expressed in joint ventures, thus, the IOY is proposed at a level that does not allow for a JVP. The Council recommended and the Regional Director proposes that both JVP and TALFF be specified at zero for the 1993 and 1994 fisheries. However, a 6,000 mt difference between ABC and IOY is set

aside to accommodate an increase in IOY if economic conditions dictate.

Classification

This action is authorized by 50 CFR part 655 and complies with Executive Order 12291 and the National Environmental Policy Act.

Authority: 6 U.S.C. 1801 *et seq.*

List of Subjects in 50 CFR Part 655

Fisheries, Reporting and recordkeeping requirements.

Dated: December 16, 1992.

William W. Fox, Jr.,

Assistant Administrator for Fisheries,
National Marine Fisheries Service.

[FR Doc. 92-30975 Filed 12-21-92; 8:45 am]

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50 CFR Part 675

[Docket No. 921220-2320]

RIN 0648-AD18

Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule; notice of proposed 1993 specifications of Pacific halibut bycatch allowances; request for comments.

SUMMARY: Pending approval by the Secretary of Commerce (Secretary) of Amendment 21 to the Fishery Management Plan (FMP) for the Groundfish fishery of the Bering Sea and Aleutian Islands (BSAI), NMFS proposes regulations that would establish halibut bycatch mortality limits for trawl and non-trawl gear fisheries in the BSAI. Apportionments of the bycatch mortality limits as bycatch allowances among fisheries and seasons for 1993 also are proposed. This action is intended to promote management and conservation of groundfish and other fish resources and to further the goals and objectives contained in the FMP.

DATES: Comments are invited on or before January 19, 1993.

ADDRESSES: Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, Alaska 99802 (Attn. Lori Gravel). The proposed rule was analyzed as part of the environmental assessment/regulatory impact review/initial regulatory flexibility analysis (EA/RIR/IRFA) prepared for Amendment 21. Individual copies of Amendment 21 and the EA/RIR/IRFA may be obtained from the

North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, Alaska 99510 (telephone 907-271-2809).

FOR FURTHER INFORMATION CONTACT:

Susan J. Salvesson, Fisheries Management Division, at 907-586-7228.

SUPPLEMENTARY INFORMATION: The domestic and foreign groundfish fisheries in the exclusive economic zone of the BSAI are managed by the Secretary in accordance with the BSAI FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and is implemented by regulations appearing at 50 CFR 611.93 for the foreign fishery and 50 CFR part 675 for the U.S. fishery.

General regulations that also pertain to U.S. fisheries appear at 50 CFR part 620.

Halibut bycatch limits for trawl and non-trawl gear fisheries that were established for 1992 under Amendment 19 to the FMP (57 FR 43926, September 23, 1992) expire at the end of 1992. Without further regulatory action, no halibut bycatch restrictions would be in effect for BSAI non-trawl gear fisheries in 1993 and beyond, and the halibut bycatch limit for trawl gear fisheries will revert back to the 1991 level of 5,333 metric tons (mt).

During its January 15-17, 1992, meeting, the Council requested that a draft EA/RIR/IRFA be prepared to analyze alternatives for Pacific halibut bycatch limits for trawl and non-trawl gear fisheries in the BSAI during 1993 and beyond. These limits would replace those that expire at the end of 1992 under Amendment 19. A draft analysis was prepared under the National Environmental Policy Act (NEPA), E.O. 12291, and NOAA policy. The Council reviewed this document at its April 22-26, 1992, meeting, and decided to send the analysis to the interested public for review. At its June 23-28, 1992, meeting, the Council considered the testimony and recommendations of its Advisory Panel (AP), Scientific and Statistical Committee (SSC), Plan Teams, fishing industry representatives, and the general public on alternative halibut bycatch limits and how those limits were to be established and managed. The following measures were approved for inclusion in Amendment 21 for review under section 304(b) of the Magnuson Act:

(1) Establish Pacific halibut bycatch limits in terms of halibut mortality rather than halibut bycatch;

(2) Establish Pacific halibut bycatch mortality limits for trawl and non-trawl

gear fisheries in regulations rather than in the FMP to allow for changes in bycatch mortality limits through a regulatory amendment process rather than an FMP amendment; and

(3) Establish FMP authority to annually apportion the non-trawl halibut bycatch mortality limit among fisheries and seasons as bycatch allowances. This authority would be similar to existing FMP provisions for annual specification of bycatch allowances of prohibited species catch limits among trawl gear fisheries.

Consistent with its recommendation of Amendment 21, the Council recommended a 3,775-mt halibut bycatch mortality limit for trawl gear fisheries at its June 1992 meeting. The Council delayed action on a Pacific halibut bycatch mortality limit for the non-trawl gear fisheries until its September 22-27, 1992, meeting. At that meeting, the Council recommended a 900-mt mortality limit for the non-trawl gear fisheries and specified the non-trawl gear fisheries that would be eligible to receive separate halibut bycatch allowances. During the September meeting, the Council also proposed bycatch allowances of the trawl and non-trawl halibut mortality limits among fisheries and seasons.

Amendment 21 is under Secretarial review. A notice of availability was published on November 16, 1992 (57 FR 54045). Secretarial approval of Amendment 21 is necessary in order for NMFS to issue this proposed rule as a final rule.

Reasons for, and a description of, this proposed rule follow:

FMP Authority to Establish Pacific Halibut Bycatch Mortality Limits in Regulations

Under Amendment 21, annual BSAI-wide Pacific halibut bycatch mortality limits for trawl and non-trawl gear fisheries would be established in regulations and revised by regulatory amendment. When developing a regulatory amendment to change a halibut bycatch mortality limit, the Secretary, after consultation with the Council, would consider information that includes:

1. Estimated change in halibut biomass and stock condition;
2. Potential impact on the halibut stock and fisheries;
3. Potential impact on groundfish fisheries;
4. Estimated bycatch mortality during prior years;
5. Expected halibut bycatch mortality;
6. Methods available to reduce halibut bycatch mortality;

7. The cost of reducing halibut bycatch mortality; and
8. Other biological and socioeconomic factors that affect the appropriateness of a specific bycatch mortality limit in terms of FMP objectives.

Fishery bycatch allowances of Pacific halibut, and seasonal apportionment of those allowances, would be annually specified and published in the *Federal Register* as required under § 675.20(a)(7). This apportionment process is further discussed below under "Apportionment of Halibut Bycatch Mortality Limits." When a fishery reaches its specified bycatch allowance or seasonal apportionment thereof, the entire BSAI would be closed to that fishery for the remainder of the year or for the remainder of the season.

The Council maintained the existing FMP provision for a "two-step" closure of the BSAI to specified trawl gear fisheries that take their halibut bycatch mortality allowance. When a specified portion of a fishery's halibut bycatch allowance is reached (primary bycatch allowance), Zones 1 and 2H are closed. When the entire bycatch allowance has been reached (secondary bycatch allowance), the entire BSAI is closed to that fishery.

Proposed Halibut Bycatch Mortality Limits Authorized Under Amendment 21

At its June 1992 meeting, the Council recommended a 3,775-mt halibut bycatch mortality limit for trawl gear fisheries and recommended the primary limit be maintained at a level equivalent to 3,300 mt of mortality. The proposed primary and secondary mortality limits assume a mortality rate of 75 percent in BSAI trawl operations and reflect the same level of mortality that resulted from the 1992 primary and secondary bycatch limits of 4,400 mt and 5,033 mt, respectively, established under Amendment 19 to the FMP. The assumed mortality rate for BSAI trawl fisheries was recommended in the 1992 Stock Assessment and Fishery Evaluation (SAFE) report dated November 1991, and was the rate used by the International Pacific Halibut Commission in establishing Pacific halibut quotas for the 1992 setline fisheries.

At its September 1992 meeting, the Council recommended a 900-mt bycatch mortality limit for the BSAI non-trawl gear fisheries. For purposes of the proposed rule, non-trawl gear means hook-and-line, jig, longline, and pot-and-line gear. The proposed limit of 900-mt is higher than the 1992 limit established under Amendment 19 (750 mt), but is less than the actual amount

of bycatch mortality experienced in the 1992 non-trawl fisheries (1,100 mt). The overage of the 1992 limit resulted from a delay in the effective date of the 750-mt mortality limit implemented under Amendment 19. This delay was requested by the Council at its August 13-15, 1992, meeting to minimize the effect of halibut bycatch restrictions on the hook-and-line fishery for Pacific cod.

The Council's proposed 900-mt mortality limit for non-trawl gear fisheries is intended to provide a total limit on bycatch mortality without imposing undue constraints on the increasing fishing effort for Pacific cod by vessels using hook-and-line gear. This increased fishing effort is attributed to continued displacement of fishing effort for Pacific cod from trawl gear to hook-and-line and pot gear due to trawl closures caused by halibut bycatch restrictions.

The Council believes the 900-mt limit should not prematurely close the hook-and-line fishery for Pacific cod during 1993 and beyond because additional management measures are being considered to reduce further halibut mortality rates and overall mortality in this fishery. These measures include mandatory cutting of ganglions, other careful release techniques, and a reduction in fishing effort for Pacific cod during summer months when halibut bycatch rates are high. The Council is scheduled to take final action on these measures during its December 1992 meeting.

For purposes of monitoring the 3,775-mt and 900-mt mortality limits proposed for trawl and non-trawl gear fisheries, respectively, the Director, Alaska Region, NMFS (Regional Director) would use groundfish catch and observed halibut bycatch rates to project when the mortality limits are reached. The Regional Director would use assumed mortality rates to monitor the bycatch mortality limits that are based on the best information available, including that contained in the final annual SAFE report. Based on analysis of 1990 observer data, the current assumed halibut mortality rates are 75 percent for BSAI trawl gear fisheries, 16 percent for hook-and-line gear and jig fisheries, and 10 percent for groundfish pot gear fisheries. The final 1993 SAFE report will be available to the Council during its December 7-11, 1992, meeting, and will include an analysis of 1991 observer data that may support alternative bycatch mortality rate assumptions for 1993.

Apportionment of the Halibut Bycatch Mortality Limits

Under proposed Amendment 21, the trawl and non-trawl halibut bycatch mortality limits would be apportioned among specified fisheries as bycatch allowances that may be further apportioned into seasonal allowances. When making these recommendations, the Council must review the need to control the bycatch of halibut and recommend appropriate apportionment of the halibut mortality limits to fishery categories. These apportionments are intended to optimize total groundfish harvest under established bycatch mortality limits, taking into consideration the anticipated amounts of incidental catch of halibut in each fishery category. The Council may recommend to exempt specified non-trawl fisheries from the non-trawl halibut bycatch mortality limit restrictions after considering the eight factors listed above for setting of halibut bycatch mortality limits.

Trawl gear fisheries that are eligible to receive separate bycatch allowances are set forth in existing regulations (§ 675.21(b)) and are categorized by target species or species groups. This provision would remain unchanged under Amendment 21. The trawl fisheries would be eligible to receive separate apportionments of the 3,775-mt halibut bycatch mortality limit as bycatch mortality allowances are yellowfin sole, rock sole/other flatfish, Greenland turbot/sablefish/arrowtooth flounder, Pacific cod, rockfish, and pollock/Atka mackerel/"other species."

Under Amendment 21, non-trawl gear fisheries that are eligible to receive separate bycatch mortality allowances also would be defined in regulations and categorized by target species or species groups and gear types. At its September 1992 meeting, the Council proposed that the following three non-trawl fisheries be eligible to receive separate halibut bycatch mortality allowances.

(1) Pacific cod hook-and-line fishery. Fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of Pacific cod that is greater than the retained amount of any other groundfish species.

(2) Groundfish pot gear fishery. Fishing with pot gear under restrictions set forth in § 675.24(b) during any weekly reporting period that results in a retained catch of groundfish.

(3) Other non-trawl fishery. Fishing for groundfish with non-trawl gear during any weekly reporting period that results in a retained catch of groundfish and does not qualify as a Pacific cod

hook-and-line fishery or a groundfish pot gear fishery.

To implement the halibut bycatch mortality limits proposed under this action, proposed apportionments of those limits must be published in the **Federal Register** for public review and comment. Normally, annual apportionments of halibut bycatch limits among fisheries are established through the annual total allowable catch (TAC) specification process undertaken by NMFS and the Council during the September and December Council meetings each year (§§ 675.20(a)(2) and 675.21(b)(3)). Pending approval of Amendment 21, the halibut mortality limits proposed under this action would become effective after the start of the 1993 fishing year. The proposed 1993 apportionments of these mortality limits among fisheries are included with the proposed rule. Public comment and testimony on the proposed apportionments will be reviewed by the Council during its December 1992 meeting. The Council is scheduled to recommend final apportionments during the December meeting that, pending approval by the Secretary, would be published with the final rule implementing the revised mortality limits authorized under Amendment 21.

During its September 1992 meeting, the Council recommended that the 3,775-mt halibut mortality limit established for trawl gear fisheries be apportioned to fisheries in the same relative manner as those specified for 1992 under Amendment 19. These apportionments also were implemented early in 1992 under a March 30, 1992, emergency rule (57 FR 11433, April 3, 1992) that was extended for an additional 90-day period (57 FR 29223, July 1, 1992). The proposed fishery apportionments, and seasonal apportionments thereof, are listed in Table 1 of this preamble. The preamble to the March 30 emergency rule and the final rule implementing Amendment 19 set forth the record in support of the proposed trawl fishery bycatch specifications listed in Table 1.

At its September 1992 meeting, the Council recommended that the groundfish pot gear fishery be exempted from halibut bycatch restrictions during 1993. It further recommended that the 900-mt halibut bycatch mortality limit proposed for non-trawl gear be seasonally apportioned between the Pacific cod hook-and-line and "other non-trawl" fisheries as shown in Table 2 of this preamble.

The Council proposed to exempt pot gear from halibut bycatch restrictions after considering that the groundfish catches by pot gear have been small to

date. Furthermore, observer information suggests that bycatch rates of halibut are low with pot gear, and the mortality of incidentally-caught halibut is only 10 percent. During 1992, the total estimated halibut mortality experienced by the groundfish pot gear fisheries was 9 mt.

TABLE 1.—APPORTIONMENT OF THE PROPOSED HALIBUT BYCATCH MORTALITY LIMIT FOR TRAWL GEAR AMONG FISHERIES AND SEASONS

Fishery allowance	Seasonal by catch (mt halibut)
Yellowfin sole:	
May 01–Aug. 02	318
Aug 03–Dec. 31	319
Total	637
Rock sole/other flatfish ¹ :	
Jan. 01–Mar. 29	424
Mar. 30–Jun. 28	71
Jun. 29–Sep. 27	71
Sep. 28–Dec. 31	(¹)
Total	566
Turnot/arrowtooth flounder/sablefish:	
Jan. 01–Dec. 31	0
Rockfish:	
Jan. 01–Mar. 29	15
Mar. 30–Jun. 28	45
Jun. 29–Sep. 27	90
Sep 28–Dec. 31	(¹)
Total	150
Pacific cod:	
Jan. 01–Jun. 28	976
Jun. 29–Sep. 27	177
Sep. 28–Dec. 31	(¹)
Total	1,153
Poliack/Atka mackerel/other species ¹ :	
Jan. 01–Apr. 15	916
Apr. 16–May 31	0
Jun. 01–Dec. 31	353
Total	1,269
Total 1992 Halibut Bycatch Mortality Limit	3,775

¹Remainder

TABLE 2.—PROPOSED 1993 APPORTIONMENTS OF THE 900-MT HALIBUT BYCATCH MORTALITY LIMIT PROPOSED FOR NON-TRAWL GEAR FISHERIES AMONG FISHERIES AND SEASONS¹

Fishery	Annual and seasonal bycatch allowances, metric tons and percent annual allowance
Pacific cod hook-and-line:	
January 1–May 14	536 (65%)
May 15–August 31	83 (10%)
Sept. 1–Dec. 31	206 (25%)
Total annual allowance	825 (100%)

TABLE 2.—PROPOSED 1993 APPORTIONMENTS OF THE 900-MT HALIBUT BYCATCH MORTALITY LIMIT PROPOSED FOR NON-TRAWL GEAR FISHERIES AMONG FISHERIES AND SEASONS¹—Continued

Fishery	Annual and seasonal bycatch allowances, metric tons and percent annual allowance
Other non-trawl fisheries:	
Jan. 1–Dec. 31	75 (100%)
Total bycatch mortality limit	900

¹Groundfish pot gear fisheries are exempt from 1993 bycatch restrictions.

The proposed seasonal halibut mortality allowances specified for the Pacific cod hook-and-line fishery were based on recommendations by representatives for the freezer longliner industry and are intended to reduce fishing effort for cod during summer months when halibut bycatch rates are highest. The market value of cod also is lowest during this period, because the quality of cod deteriorates in the post-spawning summer months and associated recovery rates are low. The distribution of fishing effort for Pacific cod during the past 3 years supports the Council's recommendation to allocate most of the halibut bycatch allowance specified for the Pacific cod hook-and-line fishery to the first 5 months of the year. During 1991–1992, the percentage of the total annual cod harvest in directed fisheries by all gear types during this 5-month period has ranged between 60 and 70 percent. The percentage of the total annual cod harvest during this period by vessels participating in the directed fishery using hook-and-line gear ranged from 38 percent in 1990 to about 52 percent in 1992. Although the 1992 fishery took 42 percent of its harvest of Pacific cod between mid May and the end of August, halibut bycatch rates peaked during this period, resulting in higher bycatch mortality of halibut than would occur if more Pacific cod were taken during the winter months.

Halibut bycatch mortality allowances and the seasonal apportionment of those allowances will be subject to change at the December 1992 Council meeting, pending public comment, year-to-date information on bycatch performance, and updated information on anticipated fishing patterns in 1993.

Classification

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has determined that this proposed rule is necessary for the

conservation and management of the groundfish fishery off Alaska and that, pending Secretarial approval of Amendment 21, would be consistent with the Magnuson Act and other applicable laws.

The Council prepared an EA for Amendment 21 and this proposed rule that discusses the impact on the environment as a result of this rule. A copy of the EA may be obtained from the Council (see ADDRESSES).

The Assistant Administrator initially determined that this proposed rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. This determination is based on the RIR prepared for this proposed rule. The proposed rule, if adopted, is not likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies or geographic regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Council prepared an IRFA as part of the RIR, which concludes that this proposed rule, if adopted, could have significant effects on small entities. A copy of this analysis is available from the Council (see ADDRESSES). More than 2,400 vessels may fish for groundfish off Alaska in 1993 and future years. The operators of all vessels fishing for groundfish in the BSAI could potentially be affected by fishery closures that are implemented when halibut bycatch allowances are reached. These closures could result in foregone gross or net wholesale revenues that approach or exceed 5 percent of an individual vessel's annual revenues. Estimated costs of the proposed halibut bycatch mortality limits to the groundfish industry are based on a bycatch model that ignores any costs associated with actions the groundfish industry takes to reduce bycatch mortality rates. These costs are unknown, but they are assumed to be lower than the costs of foregone revenues to the groundfish industry that would result from reducing halibut bycatch mortality through reduced opportunity to harvest available groundfish.

NMFS has determined that, if the groundfish fishery were conducted in accordance with the management measures proposed under this rule, the fishery would not be likely to adversely affect endangered or threatened species. Therefore, formal consultation pursuant

to section 7 of the Endangered Species Act is not required for the approval of Amendment 21 or the implementation of the proposed rule.

This rule does not include a collection-of-information requirement subject to the Paperwork Reduction Act.

NMFS has determined that this rule does not affect the coastal zone of any state with an approved coastal management program. This determination had been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 12612.

List of Subjects in 50 CFR Part 675

Fisheries, Reporting and recordkeeping.

Dated: December 17, 1992.

William W. Fox, Jr.,

Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 675 is proposed to be amended as follows:

PART 675—GROUND FISH OF THE BERING SEA AND ALEUTIAN ISLANDS AREA

1. The authority citation for part 675 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 675.2, a new definition of "non-trawl gear" is added in alphabetical order to read as follows:

§ 675.2 Definitions.

* * * * *

Non-trawl gear means hook-and-line, jig, longline, and pot-and-line gear.

3. In § 675.21, paragraph (b)(4) is removed, existing paragraphs (b)(2) and (b)(3) are redesignated as paragraphs (b)(3) and (b)(4), respectively, new paragraph (b)(2) is added, and paragraph (b) heading, redesignated paragraphs (b)(3) (ii) and (iii), and existing paragraphs (a), (b)(1), (c)(1), and (d) are revised to read as follows:

§ 675.21 Prohibited species catch (PSC) limitations.

(a) *PSC limits.* (1) The PSC limit of red king crab caught while conducting any trawl fishery for groundfish in Zone 1 during any fishing year is 200,000 red king crabs.

(2) The PSC limit of Tanner crabs (*C. bairdi*) caught while conducting any trawl fishery for groundfish in Zone 1 during any fishing year is one million animals.

(3) The PSC limit of Tanner crabs (*C. bairdi*) caught while conducting any trawl fishery for groundfish in Zone 2 during any fishing year is three million animals.

(4) The primary PSC limit of Pacific halibut caught while conducting any trawl fishery for groundfish in the Bering Sea and Aleutian Islands Management Area during any fishing year is an amount of Pacific halibut equivalent to 3,300 mt of halibut mortality.

(5) The secondary PSC limit of Pacific halibut caught while conducting any trawl fishery for groundfish in the Bering Sea and Aleutian Islands Management Area during any fishing year is an amount of Pacific halibut equivalent to 3,775 mt of halibut mortality.

(6) The PSC limit of Pacific herring caught while conducting any domestic trawl fishery for groundfish in the Bering Sea and Aleutian Islands Management Area is 1 percent of the annual eastern Bering Sea herring biomass. The PSC limit will be apportioned into annual herring PSC allowances, by target fishery, and will be published along with the annual herring PSC limit in the Federal Register with the proposed and final specifications defined in Sec. 675.20(a)(7) of this part.

(7) The PSC limit of Pacific halibut caught while conducting any non-trawl fishery for groundfish in the Bering Sea and Aleutian Islands Management Area during any fishing year is an amount of Pacific halibut equivalent to 900 mt of halibut mortality.

(b) *Apportionment of PSC limits to fisheries—(1) Apportionment to trawl fishery categories.* NMFS, after consultation with the Council, will apportion each PSC limit set forth in paragraphs (a)(1) through (a)(6) of this section into bycatch allowances for fishery categories specified in paragraph (b)(1)(iii) of this section, based on each category's proportional share of the anticipated incidental catch during a fishing year of prohibited species for which a PSC limit is specified and the need to optimize the amount of total groundfish harvested under established PSC limits. The sum of all bycatch allowances of any prohibited species will equal its PSC limit.

(i) For purposes of this section, the trawl PSC limits for red king crab, *C. bairdi* Tanner crab, and Pacific halibut will be apportioned to the fishery categories listed at paragraphs (b)(1)(iii) (B) through (F) of this section. Any amount of red king crab, *C. bairdi* Tanner crab, or Pacific halibut that is incidentally taken in the midwater

pollock fishery, as defined at paragraph (b)(1)(iii)(A) of this section, will be counted against the bycatch allowances specified for the pollock/Atka mackerel/ "other species" category defined at paragraph (b)(1)(iii)(F) of this section.

(ii) For purposes of this section, the PSC limit for Pacific herring will be apportioned to the fishery categories listed at paragraphs (b)(1)(iii) (A) through (F) of this section.

(iii) For purposes of apportioning trawl PSC limits among fisheries, the following fishery categories are specified and defined in terms of round weight equivalents of those groundfish species or species groups for which a TAC has been specified under § 675.20.

(A) *Midwater pollock fishery.* Fishing with trawl gear during any weekly reporting period that results in a catch of pollock that is 95 percent or more of the total amount of groundfish caught during the week.

(B) *Flatfish fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of rock sole, "other flatfish," and yellowfin sole that is greater than the retained amount of any other fishery category defined under paragraph (b)(1)(iii) of this section.

(1) *Yellowfin sole fishery.* Fishing with trawl gear during any weekly reporting period that is defined as a flatfish fishery under paragraph (b)(1)(iii)(B) of this section and results in a retained amount of yellowfin sole that is 70 percent or more of the retained aggregate amount of rock sole, "other flatfish," and yellowfin sole.

(2) *Rock sole/"other flatfish" fishery.* Fishing with trawl gear during any weekly reporting period that is defined as a flatfish fishery under paragraph (b)(1)(iii)(B) of this section and is not a yellowfin sole fishery as defined under paragraph (b)(1)(iii)(B) (1) of this section.

(C) *Greenland turbot/arrowtooth flounder/sablefish fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of Greenland turbot, arrowtooth flounder, and sablefish that is greater than the retained amount of any other fishery category defined under paragraph (b)(1)(iii) of this section.

(D) *Rockfish fishery.* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of rockfish species of the genera *Sebastes* and *Sebastolobus* that is greater than the retained amount of any other fishery category defined under paragraph (b)(1)(iii) of this section.

(E) *Pacific cod fishery.* Fishing with trawl gear during any weekly reporting

period that results in a retained aggregate amount of Pacific cod that is greater than the retained amount of any other groundfish fishery category defined under paragraph (b)(1)(iii) of this section.

(F) *Pollock/Atka mackerel/“other species.”* Fishing with trawl gear during any weekly reporting period that results in a retained aggregate amount of pollock other than pollock harvested in the midwater pollock fishery defined at paragraph (b)(1)(iii)(A) of this section, Atka mackerel, and “other species” that is greater than the retained amount of any other fishery category defined under paragraph (b)(1)(iii) of this section.

(2) *Apportionment to non-trawl fishery categories.* (i) The Secretary, after consultation with the Council, may apportion the halibut PSC limit for non-trawl gear set forth in paragraph (a)(7) of this section into bycatch allowances for fishery categories specified in paragraph (b)(2)(ii) of this section, based on each category's proportional share of the anticipated bycatch mortality of halibut during a fishing year and the need to optimize the amount of total groundfish harvested under the non-trawl halibut PSC limit. The sum of all halibut bycatch allowances will equal the halibut PSC limit specified at paragraph (a)(7) of this section.

(ii) For purposes of apportioning the non-trawl halibut PSC limit among fisheries, the following fishery categories are specified and defined in terms of round weight equivalents of those groundfish species for which a TAC has been specified under § 675.20.

(A) *Pacific cod hook-and-line fishery.* Fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of Pacific cod that is greater than the retained amount of any other groundfish species.

(B) *Groundfish pot gear fishery.* Fishing with pot gear under restrictions set forth in § 675.24(b) during any weekly reporting period that results in a retained catch of groundfish.

(C) *Other non-trawl fisheries.* Fishing for groundfish with non-trawl gear during any weekly reporting period that results in a retained catch of groundfish and does not qualify as a Pacific cod hook-and-line fishery or a groundfish pot gear fishery.

(3) * * *

(ii) Unused seasonal apportionments of fishery bycatch allowances made under paragraph (b)(3)(i) of this section will be added to its respective fishery bycatch allowance for the next season during a current fishing year.

(iii) If a seasonal apportionment of a fishery bycatch allowance made under paragraph (b)(3)(i) of this section is

exceeded, the amount by which the seasonal apportionment is exceeded will be deducted from its respective apportionment for the next season during a current fishing year.

(c) * * *

(1) *Attainment of a trawl bycatch allowance for red king crab, C. bairdi Tanner crab, or Pacific halibut.*

(i) *Zone 1 red king crab or C. bairdi Tanner crab bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(1)(iii) (B) through (F) of this section will catch the Zone 1 bycatch allowance, or seasonal apportionment thereof, of red king crab or *C. bairdi* Tanner crab specified for that fishery category under paragraph (b) of this section, NMFS will publish in the Federal Register the closure of Zone 1 to directed fishing for aggregate species within that fishery category, for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for the pollock/Atka mackerel/“other species” fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(ii) *Zone 2 red king crab or C. bairdi crab bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(1)(iii) (B) through (F) of this section will catch the Zone 2 bycatch allowance, or seasonal apportionment thereof, of red king crab or *C. bairdi* crab specified for that fishery category under paragraph (b) of this section, NMFS will publish in the Federal Register the closure of Zone 2 to directed fishing for aggregate species within that fishery category, for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for the pollock/Atka mackerel/“other species” fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(iii) *Primary halibut bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(1)(iii)(B) through (F) of this section in the Bering Sea and Aleutian Islands Management Area will catch the primary halibut bycatch

allowance, or seasonal apportionment thereof, specified for that fishery category under paragraph (b) of this section, NMFS will publish in the Federal Register the closure of Zones 1 and 2H to directed fishing for aggregate species within that fishery category, for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for the pollock/Atka mackerel/“other species” fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(iv) *Secondary halibut bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the trawl fishery categories listed in paragraphs (b)(1)(iii) (B) through (F) of this section in the Bering Sea and Aleutian Islands Management Area will catch the secondary halibut bycatch allowance, or seasonal apportionment thereof, specified for that fishery category under paragraph (b) of this section, NMFS will publish in the Federal Register the closure of the entire Bering Sea and Aleutian Islands Management Area to directed fishing for aggregate species within that fishery category, for the remainder of the year or for the remainder of the season, except that when a bycatch allowance, or seasonal apportionment thereof, specified for pollock/Atka mackerel/“other species” fishery category is reached, only directed fishing for pollock is closed to trawl vessels using non-pelagic trawl gear.

(2) *Attainment of a trawl bycatch allowance for Pacific herring.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the fishery categories listed in paragraphs (b)(1)(iii) (A) through (F) of this section in the Bering Sea and Aleutian Islands Management Area will catch the herring bycatch allowance, or seasonal apportionment thereof, specified for that fishery category under paragraph (b) of this section, NMFS will publish in the Federal Register the closure of the Herring Savings Areas to directed fishing for aggregate species within that fishery category, except that:

(i) When the midwater pollock fishery category reaches its specified bycatch allowance, or seasonal apportionment thereof, the Herring Savings Areas are closed to directed fishing for pollock with trawl gear; and

(ii) When the pollock/Atka mackerel/“other species” fishery category reaches its specified bycatch allowance, or seasonal apportionment thereof, only

the Herring Savings Areas are closed to directed fishing for pollock by trawl vessels using non-pelagic trawl gear.

(d) *Attainment of a Pacific halibut non-trawl fishery bycatch allowance.* If, during the fishing year, the Regional Director determines that U.S. fishing vessels participating in any of the non-

trawl fishery categories listed in paragraphs (b)(2)(ii) (A) through (C) of this section will catch the Pacific halibut bycatch allowance, or season apportionment thereof, specified for that fishery category under paragraph (b) of this section, NMFS will publish in the **Federal Register** the closure of the

entire Bering Sea and Aleutian Islands Management Area to directed fishing for aggregate species within that fishery category.

[FR Doc. 92-30974 Filed 12-17-92; 2:18 pm]
BILLING CODE 3510-22-M

Notices

Federal Register

Vol. 57, No. 246

Tuesday, December 22, 1992

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 92-027N]

FLD Policy Memoranda; Semi-Annual Listing

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This document lists and makes available to the public a memorandum which was issued by the Food Labeling Division (FLD), (formerly the Standards and Labeling Division), Regulatory Programs, Food Safety and Inspection Service (FSIS), and contains significant new applications or interpretations of the Federal Meat

Inspection Act, the Poultry Products Inspection Act, the regulations promulgated thereunder, or departmental policy concerning labeling.

FOR FURTHER INFORMATION CONTACT: Ashland L. Clemons, Director, Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 205-0042.

SUPPLEMENTARY INFORMATION: Pursuant to section 7 of the Federal Meat Inspection Act (12 U.S.C. 607 *et seq.*) and section 8 of the Poultry Products Inspection Act (21 U.S.C. 457 *et seq.*), and the regulations promulgated thereunder (9 CFR 301.1 *et seq.* and 9 CFR 381.1 *et seq.*), meat and poultry products which do not bear approved labels or other labeling may not be distributed in commerce for use as human food. Accordingly, FSIS conducts a prior approval program for labels or other labeling (specified in 9 CFR 317.4, 317.5, 381.132 and 381.134) to be used on or in conjunction with federally inspected meat and poultry products.

FSIS's prior labeling approval program is conducted by labeling

review experts within FLD. A variety of factors, such as continuing technological innovations in food processing and expanded public concern regarding the presence of various substances in foods, has generated a series of increasingly complex issues which FLD must resolve a part of the prior labeling approval process. In interpreting the Acts and regulations to resolve these issues, FLD may modify its policies on labeling or develop new ones.

Significant or novel interpretations of determinations made by FLD are issued in writing in memorandum form. This document lists one FLD policy memorandum which was issued during the period of April 1, 1992, through October 1, 1992.

Persons interested in obtaining copies of the following FLD policy memorandum, or in being included on a list for automatic distribution of future FLD policy memoranda, may write to: Printing and Distribution Section, Paperwork Management Branch, Administrative Services Division, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

Memo No.	Title and date	Issue	Reference
122	Meat Content Requirements for Meat Soups, August 11, 1992 ...	What are the meat content requirements for meat soups?	9 CFR 381.167

The FLD policy specified in this memorandum will be uniformly applied to all relevant labeling applications unless modified by future memoranda or more formal Agency actions. Applications retain all rights of appeal regarding decisions based upon these memoranda.

Done at Washington, DC, on: December 16, 1992.

Ashland L. Clemons,

Director, Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service.

[FR Doc. 92-30936 Filed 12-21-92; 8:45 am]

BILLING CODE 3410-DM-M

DEPARTMENT OF COMMERCE

Agency Forms Under Review by the Office of Management and Budget

DOC has submitted to OMB for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Export Administration (BXA).

Title: Telecommunications.

Agency Form Number: No form number but requirements will be found in Supplement 1 to Section 799.1 of Export Administration Regulations.

OMB Approval Number: None.

Type of Request: New collection.

Burden: 92 reporting/recordkeeping hours.

Number of Respondents: 75.

Avg Hours Per Response: Ranges between one and two hours for

reporting requirements — 1 minute for recordkeeping.

Needs and Uses: These reporting and recordkeeping requirements are needed to allow for increased exports of telecommunications equipment to proscribed destinations. The requirements place conditions on approved export licenses.

Affected Public: Businesses or other for-profit institutions; small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Gary Waxman, (202) 395-7340, Room 3208, New Executive Office Building, Washington, DC 20230.

Agency: Bureau of Export Administration (BXA).

Title: Application for Export License.

Agency Form Number: BXA-622P.

OMB Approval Number: 0694-0005.

Type of Request: Revision.

Burden: 11,763 hours.

Number of Respondents: 28,211.

Avg Hours Per Response: 25 minutes for reporting; 2 minutes for recordkeeping.

Needs and Uses: This collection is required to be in compliance with U.S. export regulations. The information given by U.S. exporters provides the basis for decisions to grant export licenses for exports of goods and technology that are controlled for reasons of national security and foreign policy. The collection is being slightly revised to require more specific information on end use of certain items that are now being allowed to be exported to the People's Republic of China and former Bloc countries.

Affected Public: Businesses or other for-profit institutions; small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Gary Waxman, (202) 395-7340, Room 3208, New Executive Office Building, Washington, DC 20503.

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Marine Fisheries Initiative (MARFIN).

Agency Form Number: NOAA 88-205.

OMB Approval Number: 0648-0175.

Type of Request: Extension of the expiration date.

Burden: 390 hours.

Number of Respondents: 60.

Avg Hours Per Response: Ranges between 1 and 4 hours.

Needs and Uses: The purpose of the MARFIN grant program is to develop, rejuvenate, and maintain Gulf of Mexico fisheries. Information provided by grant applicants is used by the National Marine Fisheries Service to evaluate applications and make funding decisions.

Affected Public: Individuals; state or local governments; businesses or other for-profit institutions; federal agencies or employees; non-profit institutions; and, small businesses or organizations.

Frequency: On occasion, quarterly, annually.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Ron Minsk, (202) 395-3084, Room 3019, New Executive Office Building, Washington, DC 20503.

Copies of the above information collection proposals can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482-3271, Department of Commerce, Room 5327, 14th and Constitution Avenue, N W, Washington, DC 20230.

Written comments and recommendations for the proposed information collections should be sent to the respective OMB Desk Officer listed above.

Dated: December 16, 1992

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR DOC 92-30965 Filed 12-21-92; 8:45am]

BILLING CODE 3510-CW-F

International Trade Administration

[A-559-806]

Resumption of Antidumping Duty Proceeding: Portable Electric Typewriters From Singapore

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 22, 1992.

FOR FURTHER INFORMATION CONTACT: Stephanie Hager or Ross L. Cotjanle, Office of Countervailing Investigations, U.S. Department of Commerce, room 3099, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-5055 or 482-3534, respectively.

Resumption of Proceeding

On September 3, 1992, Slip Op. 92-152, the United States Court of International Trade (CIT) reversed the Department's determination that Brother Industries (USA) Inc. (BIUSA) was not an interested party and thus did not have standing to file a petition against portable electric typewriters from Singapore. Both the Smith Corona Corporation (Smith Corona) and the United States Government have filed notices of appeal of Slip Op. 92-152.

On October 13, 1992, BIUSA sought enforcement of the Court's decision. On October 29, 1992, the Department published Portable Electric Typewriters From Singapore: Notice of Court of International Trade Decision (57 FR 49071, October 29, 1992), in accordance with the "publication" requirement in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) ("*Timken*"). The Department stated in the notice that because the decision of the CIT was not a "conclusive" decision, there was no requirement in *Timken* that the Department implement the decision. The Department stated further that "upon a 'conclusive' decision by the Court of Appeals for the Federal Circuit affirming the CIT, the Department will consider whether BIUSA filed the petition 'on behalf of' the domestic

industry; if so, the Department will proceed with the investigation."

The CIT, however, on November 30, 1992, granted BIUSA's Motion to Enforce, and stated that "in the absence of a stay Timken requires Commerce to proceed at once with implementation of the court decision, and if the investigation results in a preliminary affirmative determination, to suspend liquidation."

On December 7, 1992, Smith Corona filed an Application for a Stay Pending Appeal. On December 14, 1992, the United States Government agreed with Smith Corona's Application for a Stay Pending Appeal.

As there has been no ruling to date on the Application for a Stay Pending Appeal, the Department is hereby announcing its schedule for the implementation of the Court's decision. On or before January 29, 1993, the Department will determine whether the antidumping petition in this proceeding was filed on behalf of the relevant domestic industry. If the Department's determination is affirmative, it will simultaneously issue its preliminary antidumping determination. Subsequent determinations will be issued in accordance with the procedures and deadlines established in the Department's regulations. The Department will not be requesting additional information from any interested party in this proceeding for either of these determinations.

Dated: December 15, 1992.

Alan M. Dunn,

Assistant Secretary for Import Administration.

[FR Doc. 92-30143 Filed 12-21-92; 8:45 am]

BILLING CODE 3510-DS-M

[C-201-003]

Ceramic Tile From Mexico; Request for Revocation in Part of Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of request for revocation in part of countervailing duty order.

SUMMARY: The Department of Commerce has received a request from the Government of Mexico for revocation of forty-six firms covered by the countervailing duty order on ceramic tile from Mexico for the administrative review period January 1, 1991, through December 31, 1991.

EFFECTIVE DATE: December 22, 1992.

FOR FURTHER INFORMATION CONTACT:

Gayle Longest or Kelly Parkhill, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482-2786.

SUPPLEMENTARY INFORMATION:

Background

On June 18, 1992, the Department of Commerce initiated an administrative review of the countervailing duty order for ceramic tile from Mexico for the period January 1, 1991, through December 31, 1991. Initiation of Antidumping and Countervailing Duty Administrative Reviews. 57 FR 27212 (June 18, 1992). Prior to the initiation, the Government of Mexico had submitted a request on May 29, 1992, for revocation of the countervailing duty order for forty-six of the companies being reviewed.

The forty-six companies for which revocation was requested are:

- (1) Azulejos Decorativos Carrillo, S.A.
- (2) Azulejos Orion, S.A.
- (3) Ceramica Santa Julia, S.A. de C.V.
- (4) Eduardo S. Garcia de la Pena
- (5) Jesus Garza Arocha
- (6) Ladrillera Monterrey, S.A.
- (7) Pisos Coloniales de Mexico, S.A. de C.V.
- (8) Reynol Martinez Chapa
- (9) Teofilo Covarrubias Villarreal
- (10) Agustin Cedillo Ruiz
- (11) Alfonso Cortez Coronel
- (12) Aurelio Cedillo Ruiz
- (13) Benjamin Chavez Torres
- (14) Ernesto Cortez
- (15) Francisco Almanza Estrada
- (16) Fernando Espinosa Sanchez
- (17) Francisco Gallegos Garcia
- (18) Francisco Gallegos Olivares
- (19) Francisco Rincon Leija
- (20) Idelfonso Chavez Parga
- (21) Ines Bustos Vargas
- (22) Isabel Cortez Coronel
- (23) Jesus Ambrosio Garcia R.
- (24) Jesus Gallegos Olivares
- (25) Jesus Hernandez T.
- (26) Jesus Jimenez Lucio
- (27) Jose Angel Hernandez Martinez
- (28) Jose Arellano Valdez
- (29) Jose Davila Torres
- (30) Jose Dolores Hernandez
- (31) Jose S. Vazquez Garcia
- (32) Juan Cortez Coronel
- (33) Juan Rodriguez Rocha
- (34) Julio Ulloa Rodriguez
- (35) Leopoldo Montiel Rincon
- (36) Manuel Alvarez Ramon
- (37) Pablo Cortez Coronel
- (38) Pedro Lopez Alonso
- (39) Ramon Jimenez de Leon
- (40) Raul Leija
- (41) Rosendo Rodriguez Hernandez
- (42) Santos Rivera Tovar

- (43) Sergio Garcia de las Fuentes
- (44) Sotelo Jalomo Reyna
- (45) Vicente Jalomo Reyna
- (46) Zenon Cortez Coronel

Thirty-nine of the firms requesting revocation did not participate in all four consecutive reviews prior to the current administrative review. We note that only seven firms have been reviewed in the last four consecutive administrative reviews by the Department and found to have neither applied for nor received a net subsidy: Azulejos Orion, S.A., Eduardo S. Garcia de la Pena, Jesus Garcia Arocha, Ladrillera Monterrey, S.A., Pisos Coloniales de Mexico, S.A. de C.V., Reynol Martinez Chapa, and Teofilo Covarrubias Villarreal.

This notice is issued pursuant to 19 CFR 355.25(c)(2)(i) (1992).

Dated: December 16, 1992.

[FR Doc. 92-31044 Filed 12-21-92; 8:45 am]
BILLING CODE 3510-03-M

Minority Business Development Agency

Business Development Center Applications: Minneapolis/St. Paul SMSA (Service Area)

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program to operate an MBDC for approximately a 3 year period, subject to Agency priorities, recipient performance and the availability of funds. The cost of performance for the first budget period (12 months) is estimated at \$169,125 in Federal funds, and a minimum of \$29,846 in non-federal (cost-sharing) contributions. Cost-sharing contributions may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The period of performance will be from June 1, 1993 to May 31, 1994. The MBDC will operate in the Minneapolis/St. Paul geographic service area. The award number of this MBDC will be 05-10-93001-01.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services

to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated initially by Regional staff on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive. The selection of an application for further processing by MBDA will be made by the Director based on a determination of the application most likely to further the purposes of the MBDC program. The application will then be forwarded to the Department for final processing and approval, if appropriate. The Director will consider past performance of the applicant on previous Federal awards.

MBDCs shall be required to contribute at least 15% of the total project cost through non-federal contributions. To assist them in this effort, MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of \$50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of \$500,000 or less and 35% of the total cost for firms with gross sales of over \$500,000.

MBDCs performing satisfactorily may continue to operate, after the initial competitive year for up to 2 additional budget periods. MBDCs with year-to-date "commendable" and "excellent" performance ratings may continue to be funded for up to 3 or 4 additional budget periods, respectively. Under no circumstances shall an MBDC be funded for more than 5 consecutive budget periods without competition. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if

funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's performance, the availability of funds and Agency priorities.

Award recipients and subrecipients under this program shall be subject to all Federal Departmental regulations, policies, and procedures applicable to Federal assistance awards.

No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, a negotiated repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce (DOC) are made.

All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying;"

Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form;

Grantees (as defined at 15 CFR part 26, section 605) are subject to 15 CFR part 26, subpart F, "Government-wide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form;

Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form which applies to applicable/bids for grants, cooperative agreements, and contracts for more than \$100,000, and loans and loan guarantees for more than \$150,000, or the single family maximum mortgage limit for affected programs, whichever is greater; and

Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, Appendix B.

Recipients shall require applicants/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with

the instructions contained in the award document.

The Departmental Grants Officer may terminate any grants/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the MBDC has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of MBDC work requirements; And reporting inaccurate or inflated claims of client assistance or client certification. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

If applicants incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that they may have received, there is no obligation on the part of the Government to cover pre-award costs.

If an application is selected for funding, the U.S. Department of Commerce has no obligation to provide any additional future funding in connection with that award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of the Department.

All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or is presently facing, criminal charges such as fraud, theft, perjury, or other matters which significantly reflect on the applicant's management honesty or financial integrity; and a false statement on an application is grounds for denial or termination of funds and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

CLOSING DATE: The closing date for applications is January 29, 1993. Applications must be postmarked on or before January 29, 1993.

ADDRESSES: Chicago Regional Office, Minority Business Development Agency, U.S. Department of Commerce, 55 East Monroe, Suite 1440, Chicago, Illinois 60603.

FOR FURTHER INFORMATION CONTACT: David Vega, Regional Director, Chicago Regional Office.

Address: Chicago Regional Office, Minority Business Development Agency, 55 East Monroe Street, Suite 1440, Chicago, Illinois 60603. 312/353-0182.

Statutory Authority: 15 U.S.C. 1512.
Funding Authority: Executive Order 11625, October 13, 1971.

SUPPLEMENTARY INFORMATION:

Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. A pre-bid conference will be held on January 11, 1993, at 10 a.m. at the MBDA Chicago Regional Office. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Dated: December 16, 1992.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 92-31027 Filed 12-21-92; 8:45 am]

BILLING CODE 3610-21-M

National Institute of Standards and Technology

[Docket No. 921191-2291]

Opportunity To Join a Cooperative Research and Development Consortium for Development of New Dental Materials

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) seeks industrial parties interested in entering into a cooperative research consortium to develop a metallic, mercury-free, direct filling replacement for dental amalgam. Under 15 U.S.C. 3710a(c)(4), NIST will give preference to business units located in the United States that agree that products embodying any invention made in the consortium will be manufactured substantially in the United States. Any program undertaken will be within the scope and confines of The Federal Technology Transfer Act of 1986 (Pub. L. 99-502, 15 U.S.C. 3710a), which provides federal laboratories including NIST, with the authority to enter into cooperative research agreements with qualified parties. Under this law, NIST may contribute personnel, equipment, intellectual property and facilities—but no funds—to the cooperative research program. NIST intends to conduct a meeting in January, 1993 for interested parties. The

meeting will discuss the possible formation of a research consortium including NIST, The American Dental Association Health Foundation and industry to conduct research in this area. This is not a grant program.

DATES: Interested parties should contact NIST at the address or telephone number shown below no later than January 11, 1993.

ADDRESSES: Dr. David Lashmore, Bldg. 224, room B-166, National Institute of Standards and Technology, Gaithersburg, MD 20899.

FOR FURTHER INFORMATION CONTACT: Dr. David Lashmore, (301) 975-6405.

SUPPLEMENTARY INFORMATION: NIST seeks qualified United States industrial parties interested in entering into a cooperative consortium research program to develop a metallic, mercury-free, direct-filling replacement for dental amalgam. NIST has filed for a patent for a "Process for Forming Alloys in situ in Absence of Liquid-Phase Sintering" which may be useful in the development of such new direct-filling replacements for dental amalgams. Members will receive a time-limited, royalty bearing, co-exclusive license, limited to the dental field, for any patent issuing from the current application. In addition, it is anticipated that participating companies will receive time-limited, royalty bearing co-exclusive licenses, limited to the dental field, for any new materials developed by the consortium.

Companies should be prepared to invest \$50,000 per year in the collaboration and be firmly committed to the goal of developing a new dental restorative material that would be a viable alternative to silver-mercury amalgams.

This program is being undertaken within the scope and confines of the Federal Technology Transfer Act of 1986 (Pub. L. 99-502, 15 U.S.C. 3710a), which authorizes government owned and operated federal laboratories, including NIST, to enter into cooperative research and development agreements ("CRADAs") with qualified parties. Under the law, a CRADA may provide for contributions from the federal laboratory of personnel, equipment, intellectual property and facilities, but not direct funding. NIST intends to hold a planning meeting in January, 1993 for interested parties.

Dated: December 16, 1992.

John W. Lyons,
Director.

[FR Doc. 92-31042 Filed 12-21-92; 8:45 am]

BILLING CODE 3510-13-M

National Oceanic and Atmospheric Administration

Permits; Foreign Fishing

In accordance with a memorandum of understanding with the Secretary of State, the National Marine Fisheries Service, on behalf of the Secretary of State, publishes for public review and comment a summary of applications received by the Secretary of State requesting permits for foreign fishing vessels to operate in the Exclusive Economic Zone in 1993 under provisions of the Magnuson Fishery Conservation and Management Act (Magnuson Act, 16 U.S.C. 1801 *et seq.*). Specifically, the Russian Federation has submitted an application which requests 10,000 metric tons (mt) of Atlantic mackerel for directed fishing and 10,000 mt of Atlantic mackerel for joint venture purchases. The large stern trawler/processors GISSAR and PIONER NIKOLAEV are identified as the vessels that will fish and receive fish from U.S. vessels. Send comments on this application to: NOAA—National Marine Fisheries Service, Office of Fisheries Conservation and Management, 1335 East West Highway, Silver Spring, Maryland 20910 and/or, to one or both of the Regional Fishery Management Councils listed below:

Douglas G. Marshall, Executive Director, New England Fishery Management Council, 5 Broadway (Route 1), Saugus, MA 01906, 671/231-0422

John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Federal Building, room 2115, 320 South New Street, Dover, DE 19901, 302/674-2331

For further information contact Robert A. Dickinson, Office of Fisheries Conservation and Management, (301) 713-2337.

Dated: December 16, 1992.

David S. Crestin,
Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.
[FR Doc. 92-30921 Filed 12-21-92; 8:45 am]
BILLING CODE 3510-22-M

Marine Mammals

AGENCY: National Marine Fisheries Service, NOAA, Commerce.
ACTION: Modification No. 2 to Permit No. 634.

Notice is hereby given that pursuant to the provisions of §§ 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), Public Display Permit

No. 634 issued to Marine World Africa, USA, Marine World Parkway, Vallejo, California 94589, on April 29, 1988 (53 FR 16307), modified on January 18, 1991 (56 FR 3542) is further modified as follows:

Section B.4, first sentence is changed to read:

4. The authority to acquire the marine mammals authorized herein shall extend from the date of issuance through June 30, 1993.

This modification becomes effective upon publication in the Federal Register.

Documents submitted in connection with the above modification are available for review by appointment in the following offices:

Office of Protected Resources, National Marine Fisheries Service, NOAA, 1335 East-West Highway, room 7324, Silver Spring, MD, 20910 (301/713-2289); and

Director, Southwest Region, National Marine Fisheries Service, NOAA, 501 West Ocean Boulevard, Long Beach, CA 90802-4213 (310/980-4016).

Dated: December 16, 1992.

Michael F. Tillman,
Acting Director, Office of Protected Resources, National Marine Fisheries Service.
[FR Doc. 92-30958 Filed 12-21-92; 8:45 am]
BILLING CODE 3510-22-M

COMMODITY FUTURES TRADING COMMISSION

Authorization of the National Futures Association To Implement the Direct Electronic Entry Registration Program on a Permanent Basis; Approval of Proposed New Registration Rule 801

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice and Order authorizing the National Futures Association (NFA) to offer its current pilot Program for the Direct Electronic Entry of Registration Data on a permanent basis. Under the program, specified registrants may enter registration data electronically into the NFA computer system with respect to associated person (AP) applicants and NFA may grant temporary AP licenses on the basis of such electronic filings.

SUMMARY: Section 8a(1) of the Commodity Exchange Act (Act) provides, in part, that the Commodity Futures Trading Commission (Commission or CFTC) may grant a temporary license to any applicant for registration with the Commission pursuant to such rules, regulations, or orders as the Commission may adopt. 7

U.S.C. 12a(1) (1988), as amended by the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 (October 28, 1992). The direct entry pilot program was established in 1990 to expedite the temporary licensing process. As discussed below, NFA has submitted, and the Commission has approved, new NFA Registration Rule 801 which will permit NFA to offer the direct entry program on a permanent basis. As proposed to be operated under the new rule, the direct entry program should expedite and increase the efficiency of the temporary licensing process and other aspects of registration processing.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

By Commission order of August 28, 1990 (1990 Order), for the past nineteen months NFA has operated a program for the direct entry of certain registration information on a pilot basis. Under the pilot program, a limited number of firms have access to registration data in NFA's computer database, the Membership Registration Receivables System (MRRS). The program also permits certain participating firms to enter registration data concerning AP applicants sponsored by such firms directly into the MRRS database via computer terminals in their offices for the purpose of obtaining temporary licenses for their employees.¹

NFA now seeks Commission approval to terminate the pilot status of and make permanent the direct entry program, expand the types of filings for which direct entry may be used and make various procedural modifications to the operation of the program.² Under NFA's Proposed Rule 801, registrant sponsors would electronically enter into MRRS all information required to be filed on Form 8-R (application for registration for individuals), Form 3-R (supplemental statement to application for registration), Form 8-T (notice of termination) or Form U-5 (uniform termination notice for securities

industry registration) for all AP applicant's, APs, principals and branch office managers³ of such sponsors and of any introducing brokers (IBs) guaranteed by such sponsors for whom the sponsors have assumed registration responsibilities.

As set forth in the Submission, NFA also proposes to modify the procedures followed under the pilot program in a number of respects designed to increase the efficiency of the program, including: (1) Elimination of the notice to the Commission and approval requirements for adding firms to the program; (2) reduction of the period of Phase II operational experience required before firms may advance to Phase III of the program; (3) reduction of line-by-line review by NFA of electronically filed forms; (4) reduction of statistics provided to the Commission; (5) elimination of the requirement that all forms be entered electronically by each participating firm; (6) expansion of the program to permit electronic filings of Forms 8-R and 8-T for principals and of Forms 3-R updating Forms 7-R; and (7) elimination of certain paper filings.

B. History of the Direct Entry Program⁴

NFA's direct entry procedures were developed to expedite the temporary licensing process by allowing direct input of data by firms into NFA's MRRS database, thereby permitting applicants to act as APs sooner than if their applications were mailed or delivered to NFA and the data entered into the NFA database by NFA personnel. This mechanism is fully consistent with the primary purpose of the temporary license procedure—to enable apparently qualified applicants to begin work as soon as possible prior to completion of a full fitness check.⁵

The direct entry program had its genesis in a 1987 proposal by NFA to provide certain member firms the capability to access and query the MRRS database. This access capability, which later became known as Phase I of the direct entry pilot program, simply provided firms with computer access to registration information concerning their own employees and public information concerning other registrants without having to obtain such information from NFA's Registration Department or Information Center. This

procedure became operational on November 10, 1987 when the Commission approved NFA's proposal to provide two futures commission merchants (FCMs) with direct inquiry access to NFA's registration database.⁶ NFA states that this phase of the program has enabled it to reduce the resources required to respond to member firm inquiries and provide improved service to members of the public requesting information from the NFA Information Center.

On January 5, 1989, NFA petitioned the Commission for authorization to implement a program for direct entry of AP registration data into NFA's MRRS system by the sponsors of APs (Phase II) and ultimately the electronic granting of temporary licenses for APs following such direct entry of registration data (Phase III).⁷ By order dated August 28, 1990, the Commission authorized NFA to implement Phases II and III of the direct entry program as a pilot program subject to certain conditions which generally incorporated procedures proposed by NFA.⁸ These conditions included the following: (1) Sponsors would continue to be required to file with NFA the required paper registration forms, fingerprint cards and sponsor certifications, which would be compared with electronically entered data material to the granting of a temporary license and used to complete the fitness processing for final registration determinations; (2) all participating firms would be required to sign NFA's Agreement For Firm Direct Entry Privileges to MRRS (Direct Entry Agreement), setting forth the conditions, responsibilities and obligations of pilot program participants; (3) NFA would comply with its responsibilities under the direct entry pilot program as set forth in its January 5, 1989 petition; (4) any firm not specified in the Commission's order would be required to receive permission to participate in Phase II; (5) implementation of Phase III of the pilot program would be subject to Commission approval; (6) NFA would provide the Commission with monthly statistical reports relating to the pilot

¹ A temporary AP license allows an applicant who is eligible for registration to act as an AP of his sponsoring firm without waiting for completion of a full fitness screening which, due to the necessity to have fingerprint cards processed by the Federal Bureau of Investigation, may take six to eight weeks. The applicant may not be granted AP registration until the fitness screening is concluded.

² Request for an Order Granting NFA Permission to Offer the Direct Entry Registration Program on a Permanent Basis Pursuant to Proposed New Registration Rule 801, submitted by NFA, July 9, 1992 (Submission), as supplemented by submissions dated August 27, 1992, October 8, 1992, November 13, 1992, November 25, 1992 and December 8, 1992. Submission at 2.

³ Branch office managers are APs but also are required to disclose their status as branch office managers on Forms 8-R, 3-R and 8-T.

⁴ A more detailed discussion of the direct entry pilot program is provided in the Federal Register release accompanying the Commission's order approving the pilot program. 55 FR 35925 (September 4, 1990).

⁵ 49 FR 8208, 8210 (March 5, 1984).

⁶ See letter from Lawrence B. Patent, Associate Chief Counsel, Division of Trading and Markets, CFTC to Daniel J. Roth, Vice President, General Counsel and Secretary, National Futures Association, dated November 10, 1987 responding to letters dated October 6 and 29, 1987 from Daniel J. Roth to Andrea M. Corcoran, Director, Division of Trading and Markets, CFTC.

⁷ This petition was supplemented by a letter dated July 17, 1990 from Daniel J. Roth, Vice President, General Counsel and Secretary, NFA, to the Division of Trading and Markets, CFTC, which identified the firms seeking authorization to participate in Phase II.

⁸ See 55 FR 35925, 35934 (September 4, 1990).

program; and (7) NFA would terminate any temporary license granted under the pilot program if NFA did not receive all required follow-up paper filings or if NFA's review of the paper filings revealed that an applicant was not eligible for a temporary license or the temporary license had been granted by mistake or as a result of fraudulent means.

Currently, the direct entry pilot program operated by NFA pursuant to the Commission's Order consists of three phases. Under Phase I, as noted above, participating FCMs are provided with direct inquiry access, via computer terminals at those firms, to all registration information in the MRRS database to which they are entitled under NFA Registration Rules 701 (b) and (c). This information includes all registration information relating to a firm's own employees and prospective employees and public information regarding all registrants. As of October 31, 1992, 25 firms were participating in Phase I.⁹

Phases II and III of the pilot program permit participating firms to enter electronically into NFA's registration computer system, through terminals located in their offices, information required to be filed on Form 8-R, Form 3-R, Form 8-T or Form U-5 for all AP applicants, APs and branch office managers. Under Phase II, although the participating firm enters the AP application data by computer, only NFA personnel are authorized to instruct the NFA computer system to process an application and, if appropriate, grant a temporary license. The Commission's 1990 Order authorized participation by ten firms in Phases II and III of the program but provided that additional firms could be added with prior approval. The 1990 Order also required that Commission staff be provided an opportunity to review data concerning the accuracy, timeliness and completeness of data entry during Phase II and to raise any concerns or objections deemed appropriate based upon the Phase II data and other experience prior to implementation of

Phase III of the pilot program. See 55 FR 35925 (September 4, 1990). As of October 31, 1992, three firms were participating in Phase II of the program: Refco, Inc., Prudential Securities Inc., and Shearson Lehman Brothers Inc. Another Phase I participant, Cargill Investor Services, Inc., has been approved but is not yet participating in Phase II. The 1990 Order also provided that a participating Phase II firm would not become eligible for participation in Phase III until completion of ninety days in Phase II.

Under Phase III of the pilot program, participating firms continue to enter AP registration data directly into NFA's registration computer system. However, under Phase III, qualifying AP applicants are issued a temporary license upon entry of a computer command by the participating firm when the application data entered by the firm indicate that the AP is eligible for a temporary license.¹⁰ The participating firm must file the hardcopy Form 8-R, together with the applicant's fingerprint card and evidence of the applicant's satisfaction of the NFA proficiency requirements,¹¹ by mailing it to NFA on the same day on which the firm directs MRRS to process the application. A temporary license is issued by NFA immediately when the data entered in MRRS by the participating firm indicate that the AP applicant is eligible for a temporary license. NFA immediately terminates any previously issued temporary license if the applicant's Form 8-R, fingerprint card or proof of passage of the Series 3 examination are not received by NFA within five business days of the date on

which the application was filed electronically. NFA registration staff compare the information on the hardcopy Form 8-R with the application information previously entered into MRRS by the sponsoring firm. If such comparison discloses different information from that entered directly by the sponsoring firm and that information indicates that the applicant is not eligible for a temporary license because of, for example, derogatory information indicating a statutory disqualification, NFA terminates the temporary license. Subsequent FBI fitness reports or fitness checks with the Securities and Exchange Commission (SEC) revealing disqualifications not previously disclosed result in termination of the temporary license upon five days notice.¹² Currently, four firms are participating in Phase III of the program: LIT America, Inc., Merrill Lynch, Pierce, Fenner & Smith, Index Futures Group and Brokers Resource Corp.¹³

As of October 31, 1992, 1,078 filings had been processed under Phase II of the pilot program and 1,094 filings had been processed under Phase III of the pilot program.¹⁴ Filings under Phases II and III represent about four percent of all registration filings received by NFA during the same period. Of the 1,078 forms filed under Phase II, 376 were Forms 8-R, 75 were Forms 3-R, and 627 were termination notices (either Form 8-T or Form U-5). Of the 1,094 forms filed under Phase III, 489 were Forms 8-R, 158 were Forms 3-R and 447 were termination notices.

Based upon its item-by-item comparison of the data entered into MRRS and the information on the registration forms submitted by participating firms, NFA describes the performance of participating firms during the pilot program as

¹⁰ In order for an applicant to qualify for a temporary license, the applicant must submit a completed registration application which includes a fingerprint card and sponsor's certification. In addition, in order for the applicant to qualify for a temporary license, the application may not contain a "Yes" answer to any of the disciplinary history questions on the application (questions 14-16) (self-declared derogatory information). In addition, the applicant may not have a conditional, suspended or revoked registration and must not be the subject of a current NFA investigation. Finally, the applicant must provide proof of successful completion of the National Commodity Futures Examination (Series 3).

¹¹ NFA Bylaw 401(b) provides that no person may be associated with an NFA member (i.e., as an AP) unless the person is registered with NFA as an associate. NFA Registration Rule 401 requires as a condition for associate registration evidence that the applicant has taken and passed the National Commodity Futures Examination no more than two years prior to the date the application is received by NFA, has been duly registered in another capacity within that two-year period, or is registered with the National Association of Securities Dealers (NASD) as a general securities representative and the applicant's activities will be limited to the solicitation of funds for commodity pools or referring clients to an AP who has satisfied the proficiency requirements.

¹² If a firm were to make a data entry error that was potentially adverse to the applicant's registration status, there would be an opportunity for correction of the error prior to any adverse action being taken. Before any action is taken to deny registration, the affected applicant usually is notified by a letter from the NFA Director of Compliance, or the Director's designee, of the contemplated action and the basis for it and provided with an opportunity to withdraw the registration application. Registrants are provided with a notice of commencement of a revocation proceeding and an opportunity for a hearing before any adverse action is taken with respect to their registration status.

¹³ Index Futures Group and Brokers Resource Corp. are treated as one firm for the purpose of compiling performance data.

¹⁴ The Submission cites 1,037 as the total number of filings received during the pilot program, representing electronic filings from April 12, 1991 through April 12, 1992. The number cited in the text represents the total number of electronic filings filed from April 12, 1991 through October 31, 1992.

⁹ As of October 31, 1992, the firms participating in Phase I are: ADM Investor Services, Inc., Advest, Inc., Brody White & Co., Inc., BT Futures Corp., Cargill Investor Services, Inc., Colorado Commodities Management Corp., Commodities Corp., Daiwa Securities America, Inc., Dean Witter Reynolds, Inc., ED&F Mann International Futures, Inc., First American Discount Corporation, Geldermann Inc., Goldman Sachs & Co., J.P. Morgan Futures, Inc., Kamper Securities Group, Inc., Lind-Waldock & Company, Lincco Futures, Inc., Nomura Securities, Inc., Paine Webber Inc., Rodman & Renshaw, Inc., R.J. O'Brien Associates, Inc., Rosenthal Collins Group, Salomon Brothers, Inc., UBS Securities, Inc., and Vision Limited Partnership.

"outstanding."¹⁵ Specifically, NFA reports that since the implementation of Phase II of the pilot program, of the 2,172 direct entry filings received, only one contained a material discrepancy between the electronic filing and the paper filing.¹⁶ Fewer than five percent of these filings contained non-material discrepancies, primarily typographical errors.¹⁷ NFA submits that these data demonstrate that the reliability of registration data has not been affected by use of direct entry procedures.¹⁸ NFA also notes that during the nineteen months that the pilot program has been in operation, all paper filings have been timely received.

With regard to the fitness screening process during the pilot program, when an applicant disclosed a potential disqualification, a temporary license was not issued and the applicant was accorded the same fitness review applicable where a potential disqualification was disclosed in a paper filing. During Phases II and III of the pilot program, any filings deemed not qualified for a temporary license due to a disciplinary history disclosure were referred to NFA's fitness review staff, and potentially to NFA's Registration Compliance Legal Committee, for a full fitness review. As of October 31, 1992, thirty-one applications had resulted in such referrals. In addition, all FBI fingerprint cards were received within one day of the electronic filing, enabling the FBI background checks to begin virtually immediately. NFA reports that it identified no instances during the pilot program in which an individual ineligible for registration received a temporary license.¹⁹

NFA states that its experience with the pilot program demonstrates that neither fitness screening nor any other aspect of the registration process is compromised by the substitution of electronic filing for paper filing. NFA

¹⁵ Submission at 8.

¹⁶ In that case, one of the Form 8-R disciplinary history questions was not answered on the hardcopy Form 8-R although the electronic filing indicated a "no" answer. As soon as NFA discovered the discrepancy, it terminated the temporary license. That same day, however, NFA learned that the "no" response was the appropriate answer and the temporary license was reissued. Submission at 8, n.1.

¹⁷ Submission at 8.

¹⁸ NFA also notes that it receives completed applications more expeditiously from firms participating in the direct entry program, as evidenced by a significantly lower number of deficiency letters being issued as a result of direct entry filings than for paper filings. Approximately thirty-eight percent of paper filings result in a deficiency letter being sent to the firm as compared to less than one percent issued as a result of direct entry filings.

¹⁹ Submission at 7.

also reports that due to the transfer to the clerical data entry responsibility from NFA to sponsoring firms under the direct entry program, it has experienced a significant decrease in the resources required for registration processing functions. NFA notes that soon after the start of Phase I, NFA's registration processing staff was reduced by more than fifty percent, a reduction it attributes to the efficiencies of the MRRS system as well as the decrease in NFA processing activities due to the direct entry program. NFA also notes that since the direct entry program became operational the number of calls received at its Information Center has remained steady and in some years has decreased, whereas prior to the direct entry program the number of calls to the Information Center had increased substantially each year. NFA represents that the firms participating in Phase II of the program receive temporary licenses for their AP applicants approximately four business days sooner than those firms using paper filings.

II. Discussion

A. The Proposed Rule

NFA Registration Rule 801 would make the direct entry program permanent.²⁰ Subject to certain conditions, the rule allows, but does not require, all sponsoring firms to file Forms 8-R, 3-R, 8-T and U-5 electronically by direct dial-up transmission to NFA's registration and membership database. With respect to the electronic filing of Forms 8-R, a sponsoring registrant must send to NFA,²¹ on the same day it has directed the computer to process the electronic filing, the applicant's disciplinary history on a hardcopy form provided by NFA and signed by the applicant, together with the applicant's fingerprints and proof of successful completion of the proficiency examination, as provided by NFA Registration Rule 206(a)(3). The disciplinary history section of Form 8-R contains important information

²⁰ NFA Registration Rules 701 (Disclosure of Information from Registration Records Maintained by NFA) and 702 (Certification of the Authenticity of Registration Records Maintained by NFA) make reference to "registration records" and "application forms". With the adoption of Registration Rule 801, the terms "registration records" and "application forms" will encompass any forms filed electronically pursuant to that rule. Thus, NFA will consider a registration form filed electronically to be a registration record and/or an application form pursuant to NFA Registration Rules 701 and 702.

²¹ Rule 801 would require that such filing be made by first-class mail, hand-delivery or any other standard means of conveyance including a generally recognized overnight delivery service.

concerning the applicant's background which directly relates to eligibility for registration. The disciplinary history form required to be signed by the applicant and provided in hardcopy to NFA will contain the applicant's signature certifying to the truthfulness and accuracy of the disciplinary history set forth therein and all other certifications and agreements by the applicant currently required by the Form 8-R.²² By signing the disciplinary history form, the applicant will further certify: (1) That all information he has provided to his sponsoring firm in connection with the electronically filed portion of the application is true and not misleading, and (2) that he understands that a willfully false or misleading statement or omission made to his sponsoring firm and electronically transmitted by the firm to NFA will have the same effect as a willfully false or misleading statement or omission made in a hard copy application signed by him.

With respect to the remainder of the Form 8-R, which comprises the bulk of the form and includes information relating to the applicant's residential, employment and educational history, no paper filing requirement would exist, and thus no handwritten signature by the AP applicant attesting to the accuracy and completeness of the information, would be incorporated in the submission to NFA. Proposed Rule 801(b), however, provides that by authorizing the computer to process an electronically filed form, the registrant firm electronically certifies that it has complied with all requirements of the rule and has made all reasonable efforts to ensure that the applicant information

²² A Form 8-R currently requires certifications by the individual applicant as to, among other things, his understanding that he is subject to the imposition of criminal penalties for any false statements or omissions made in the application, that he will at all times keep accurate and current the answers to the items required to be updated, and that his answers and statements on the Form 8-R are true and not misleading. Form 8-R currently incorporates, and the disciplinary history form to be employed under Rule 801 will also incorporate, certain agreements by the applicant relating to application for membership as an Associate member of NFA. (Letter from Daniel J. Roth, dated November 25, 1992 to Jean A. Webb, Secretariat, CFTC). As noted above, Rule 801 will not require filing with NFA of the hardcopy of the complete Form 8-R including the applicant's employment and educational history. Therefore, absent action by the sponsoring firm to maintain hardcopy records of information on the latter topics supplied by the applicant, no hardcopy record of the applicant's employment and educational history to support the firm's electronic filing will be preserved. The requirements of Commission rules as to the necessary support for the sponsors certifications required under Rule 3.12 are discussed *infra*.

entered by electronic filing is accurate.²³ Rule 801 requires a firm to make all of the certifications required by Rule 3.12(c) and the current Form 8-R.²⁴ The Rule also provides that these electronic certifications "shall have the same force and effect as a certification on the Form itself signed by an authorized officer of

the registrant."²⁵ Proposed Registration Rule 801(b).²⁶

The applicant's disciplinary history, with all required attachments, must be received by NFA within five business days after the electronic filing is processed. If the applicant's disciplinary history and required attachments indicate that the applicant does not qualify for a temporary license or NFA fails to receive the form with all

required attachments and certifications within five days after the electronic filing was processed, NFA will terminate immediately, upon notice to the sponsoring firm, any temporary license previously granted. Proposed Registration Rule 801(a)(2).

Proposed Rule 801 also provides that no registrant may electronically file registration forms until NFA has assigned it an identifying code and password and that each registrant is responsible for maintaining the security and confidentiality of its identifying code and for controlling access to all terminals that have inquiry or data entry access to NFA's MRRS database. Proposed Registration Rule 801(c) and (d). Finally, the rule states that electronic filing "is a privilege and not a right" and that NFA may disable a registrant's identifying code and password, thereby terminating the registrant's ability to file forms electronically, as opposed to in hard copy, at any time, without notice or hearing, in NFA's sole discretion. Proposed Registration Rule 801(f).

B. Consistency With Commission Rule 3.12(c)

The direct entry of registration data, pursuant to proposed Rule 801, would substantially modify the manner of submitting registration application data from that contemplated by paper filing systems such as were in use at the time of the promulgation of the Commission's requirements for registration applications. The Commission has reviewed proposed Rule 801 to assure that it is consistent with the requirements of the Commission's registration rules, in particular, Rule 3.12(c) governing applications for registration as an AP of an FCM or IB, and to determine whether any modifications of Commission rules are needed to accommodate the use of direct entry procedures. Based upon this review, the Commission has determined that no rule changes are necessary and that existing requirements can be applied in the direct entry context.

Commission Rule 3.12(c) requires that an application for registration as an AP of an FCM or IB must be on Form 8-R, completed and filed in accordance with the instructions thereto and that specified certifications "in writing" and signed and dated by the sponsor must be submitted concurrently with the Form 8-R. Rule 3.12(c) also requires that each Form 8-R filed pursuant to that rule must be accompanied by the fingerprints of the applicant on a fingerprint card provided for that purpose by the NFA. Rule 3.12(e) provides that the sponsor must retain in

²³ The certification required by the rule is accomplished by electronic data entry. After all the information required on the Form 8-R, 3-R, 8-T or U-5 has been entered into the computer, a question will appear on the screen asking the data entry operator whether he or she is ready to process the form. A "yes" answer to this question means that the firm is certifying, and in effect, verifying all of the previously entered data. In addition, by answering "yes" to the question, the firm is also certifying that it is forwarding the fingerprint card and proof of the applicant's successful completion of the National Commodity Futures Examination. Proposed Registration Rule 801(a)(1).

²⁴ Under proposed Rule 801, the sponsoring firm must certify that: (1) the information supplied by the applicant in response to questions contained in the electronically filed Form 8-R relating to the applicant's employment and education history for the past three years has been verified; (2) the applicant has been hired or is employed by the firm or that it is the intention of the firm to hire or otherwise employ the applicant as an AP within thirty days after the firm receives notification that the applicant has received a temporary license; (3) the applicant will not be permitted to act as an AP until a temporary license has been issued or he has been registered pursuant to the electronically filed application; (4) the firm understands that it is under a duty not to employ a person subject to a statutory disqualification under Section 8a(2) of the Act, to notify the Commission when any employee becomes subject to such a disqualification and to supervise applicants named in electronic filings with a view towards preventing applicants from violating the Act; (5) in the case of an applicant answering items 14 or 16 on the Form 8-R in the affirmative, the firm has received a copy of the complaint or letter issued by the Commission or NFA; and (6) the information contained in the electronically filed Form 8-R has been obtained by the firm for the sole purpose of verifying the information contained in the applicant's Form 8-R and the firm will seek to prevent the wrongful dissemination of any of the information contained in the electronically filed Form 8-R and of any records and documents retained in support thereof.

²⁵ Although the validity of an electronic certification as an authorized "signature" of a firm or its officers has not been established as yet by judicial precedent, there is precedent establishing the validity of "signatures" other than handwritten signatures. See *Corn v. Bessemer Cement Company*, 558 F. Supp. 706 (W.D. Pa. 1983) (holding pre-printed company name constituted company's signature on a bill of lading for purposes of exercising the consignor's "non-recourse" option under such bill of lading and noting that it "appears to be settled under the common law that a printed name on an instrument which is intended to have the force of a signature is valid and thus will have the intended effect"). See also, Uniform Commercial Code § 1-201(39) which provides that the term "signature" means any symbol executed or adopted by a party with the present intention to authenticate a writing. On August 7, 1992, the SEC published for comment in the Federal Register proposed rules and procedures to implement the operational phase of its Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. See 57 FR 35070 (August 7, 1992). The proposed regulation, Regulation S-T, will apply to electronic submissions processed by the SEC's Division of Corporation Finance, and in some cases, to those processed by the Division of Investment Management. The proposed rules provide that: Signatures to or within any electronic filing shall be in typed form rather than manual format. For purposes of Regulation S-T (part 232 of this chapter), the term "signature" means an electronic entry in the form of a magnetic impulse or other form of computer data compilation of any letter or series of letters comprising a name, executed, adopted or authorized as a signature. Proposed § 232.13 of Regulation S-T.

The SEC is proposing to require that essentially all documents, including filings, correspondence and supplemental information submitted by or relating to registrants under the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939 and the Investment Company Act of 1940, be submitted electronically. This would include periodic and other filings by domestic companies on Forms 10-K, 10-Q, 8-K, 10 and definitive proxy statements, annual and quarterly reports of domestic companies on Forms 10-K and 10-Q, Securities Act registration statements, filings made in connection with tender offers on Schedules 13D, 13G, 14D-1, 14D-9, 13E-3, and 13E-4, stock ownership reports on Forms 3, 4, 5, 144 and 13F, and Schedules 13D, 13G and 14D-1, and periodic reports filed under the Investment Company Act on Forms N-SAR-A, N-SAR-B and N-SAR-U. Although such filings do not involve licenses, the NASD currently permits electronic filing of certain information relating to licenses of securities professionals. With respect to electronic filing of registration information, see note 46 *infra*.

²⁶ Rule 801 also requires that each firm filing registration information electronically make available its data entry personnel having duties relating to filing under the direct entry program for testimony in court or before the Commission, NFA or any contract market regarding the authenticity, integrity or accuracy of any electronic filing. Proposed Registration Rule 801(e).

accordance with Rule 1.31 "such records as are necessary to support the certifications required by this section."

The Commission believes that the requirement of "signed and dated" written certifications by the applicant's sponsor may be satisfied by electronically filed certifications of the sponsor pursuant to Rule 801, which establishes that by directing the computer to process an electronically filed form, the sponsoring registrant makes the certifications required as part of the current Form 8-R, including the certifications required by Rule 3.12(c), and that these certifications "shall have the same force and effect as a certification on the form itself signed by an authorized officer of the registrant." These certifications are in written text submitted electronically and are "signed" by the firm by typewritten rendering of the firm name on the electronic filing and by the firm's affirmative action authorizing the computer to process the electronically filed form. As noted above, each registrant using direct entry procedures must be assigned an identifying code and password and is responsible for maintaining the confidentiality of its identifying code and for controlling access to terminals that are used for electronic filing. Consequently, the sponsoring firm is properly charged with responsibility for data entered pursuant to its identifying code and password. Thus, under the terms of Rule 801, a firm that has directed the computer to process an electronically filed form is fully responsible for the submission of that information and for the certifications included therein.

Rule 3.12(e) further requires that the sponsor retain such records as are necessary to support the certifications required by this section. The Commission emphasizes that the required certification under Rule 801 by the applicant's sponsor that it has verified the information supplied by the applicant in response to questions contained in the electronically filed Form 8-R relating to the applicant's employment and education history for the past three years would necessitate that the firm retain either in hardcopy, optical disc format, or comparable recordkeeping system the information supplied by the applicant, certified by the applicant's signature, and such further records as are necessary to evidence verification of this information from other sources.²⁷

²⁷ The requirement of Rule 3.12(c) that fingerprint cards for the applicant be filed with the Form 8-R is satisfied by filing of such cards with the disciplinary history portion of the Form 8-R, which

C. Fitness Screening

The direct entry program substitutes instantaneous electronic transmission of information for mailed transmission of hardcopy forms, effectively transferring the clerical data entry function for registration information from NFA to the sponsoring firm. The direct entry program does not change the content of the information required or the nature of NFA's review of that information; the only change is in the manner in which data are supplied to NFA and entered into the MRRS system. The evaluation of potential registration disqualifications is not modified by reason of the electronic filing of registration data.²⁸ Under the proposed Rule, temporary licenses granted on the basis of an electronic filing terminate immediately upon notice to the sponsoring registrant that the applicant's disciplinary history, with all required attachments, has not been received by NFA within five business days after the electronic filing was processed or that the Form 8-R or required attachments indicate that the applicant does not qualify for a temporary license.²⁹ All information critical to temporary license eligibility will continue to be reviewed by NFA staff, as under the pilot program. NFA will conduct the same fitness review of electronically filed information and will retain the same ability to terminate a temporary license based upon electronically filed applications as in the case of paper applications. As noted above, NFA has identified no instance under the pilot program in which an individual ineligible for registration received a temporary license.

D. Reliability of Registration Data in the MRRS System

In approving the direct entry pilot program, the Commission addressed the potential impact of the program upon the reliability of the MRRS data due to the performance by sponsoring firms of data entry functions, noting that applicants and their sponsors would have the same incentives to provide accurate registration information as under preexisting procedures. 55 FR 35925, 35930 (September 4, 1990). Firms and individual applicants continue to be bound by section 8a(2)(G)

is required to be submitted in hardcopy under Rule 801.

²⁸ Submission at 7.

²⁹ Notice of termination may be given by electronic transmission to a terminal on the sponsoring registrant's premises, by United States mail, by hand delivery, or by "any other standard means of conveyance including a generally recognized overnight delivery service." Proposed Registration Rule 801(a)(2).

and section 8a(3)(G) of the Act, 7 U.S.C. 12a(2)(G) and 12a(3)(g) (1988), as amended by the Futures Trading Practices Act of 1992, which make the willful submission of inaccurate registration information grounds for denial, revocation, restriction, conditioning or suspension of registration. In addition, firms could be sanctioned under NFA Compliance Rule 2-2(f)³⁰ for the willful submission of materially false or misleading information through direct entry of such data into MRRS. Further, unintentional but frequent data entry errors could subject a firm to disciplinary action under NFA Compliance Rule 2-9 for lack of appropriate supervision.³¹ Finally, a participating firm's failure to diligently supervise the operation of direct entry filings of registration data would constitute a violation of Commission Rule 166.3, 17 CFR 166.3 (1992), which generally requires diligent supervision of all activities of the firm's partners, officers, employees or agents relating to the firm's business as a Commission registrant.³² The direct entry program, therefore, should not provide any unique incentive for a firm to falsify data in order to obtain a temporary license or a materially greater opportunity to do so than under current procedures in which a temporary license is granted or denied on the basis of self-declared information filed in hard copy.³³

NFA developed extensive review procedures to detect data entry errors and to assure the accuracy of the information in MRRS during the pilot program. These review procedures included the line-by-line comparison of all hardcopy registration forms received as follow-ups to the electronic filings. NFA has proposed to change its line-by-line review procedure from a review of all information on the Form 8-R

³⁰ NFA Compliance Rule 2-2(f) provides that no NFA member or associate shall willfully submit materially false or misleading information to NFA or its agents.

³¹ NFA Compliance Rule 2-9 provides that each NFA member shall diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the member.

³² Commission Rule 166.3, 17 CFR 166.3 (1992), provides that:

Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.

³³ See 55 FR 35925, 35931 (September 4, 1990).

program to a review of only that information critical to the granting of a temporary license, *i.e.*, the applicant's disciplinary history. However, NFA will review all Forms 8-R on a line-by-line basis during a firm's training period (currently Phase II). Once NFA is satisfied that the firm has become proficient at the data entry function it will allow that firm to proceed to Phase III, in which only an applicant's disciplinary information will be required in hardcopy and reviewed on a line-by-line basis. NFA states that this change in its review procedures will not reduce the thoroughness of fitness screening or the reliability of the MRRS registration data. The statistics provided by NFA during the pilot program indicate that the firms participating in the program are entering data accurately and there appears to be no reason why firms would enter data less accurately if NFA alters its review procedures as proposed. As previously noted, repeated problems in entering accurate data by a firm operating under the direct entry program could lead to loss of that privilege (See Rule 801(f)), as well as sanctions under NFA Compliance Rule 2-9 or Commission Rule 166.3.

E. Computer Security

A further concern relevant to the proposal to make the direct entry program generally available to all sponsoring registrants is the potential impact upon the integrity of MRRS data as a result of unauthorized access to the MRRS system. NFA represents, however, that its state of the art security system makes a breach of security almost impossible. NFA states that its security practices make unauthorized access extremely difficult, limit exposure if unauthorized access is gained, and give NFA the ability to reconstruct data prior to the point of unauthorized access.³⁴ NFA's security procedures include membership in both IBM's Resource Access Control Facility (RACF), which protects access to MRRS by identifying and verifying the person attempting to gain access to MRRS and tracks unauthorized attempts to gain access to MRRS, and the IBM Information Network, which affords remote access to MRRS.

In order to obtain access to MRRS, other than from a terminal on NFA's premises, a user would need to have five different pieces of information:

NFA's IBM Information Network account number, a user ID and a password for access to the IBM Information Network, and a user ID and password for access to NFA's computer system. Every authorized user is given a security profile by NFA's Security Administrator which is made unique by assigning the user his or her own individualized user ID. The security profile determines which systems, screens and fields the user is allowed to view and the systems, screens and fields to which the user is allowed access. For example, based on its security profile, a Phase II/Phase III user would not be allowed to update information in the files of an unaffiliated firm. All attempts to breach security are recorded by the computer. As a security safeguard, any terminal which remains inactive for fifteen minutes is automatically signed off by the computer. Member firms will not have programming access to NFA's computer system.

NFA states that the chance of a computer virus entering the system through a participating firm's terminal are "practically non-existent." In the unlikely event of unauthorized access, the access gained would be limited and NFA has the ability to reconstruct data prior to the point of contamination. NFA uses the Journaling Facility of the Computer Associates' Integrated Database Management System DATA BASE product to record all changes to the data in the system. This journal shows the data in existence before the change, the data as changed, and the cause of the change. By use of the journal, NFA personnel can determine when any damage occurred.³⁵

Although NFA acknowledges that no security system is completely fail-safe, it represents that the chances of unauthorized access to the MRRS system are extremely small and will be virtually unchanged by the limited access to be gained through off-site terminals in the offices of participating firms.³⁶ Moreover, NFA states that it is virtually impossible to cause damage to the MRRS system or the data stored on MRRS.

III. Proposed Procedural Changes to the Pilot Program

NFA has proposed certain changes to the direct entry program to facilitate making the program generally available to all sponsoring registrants and to

increase the benefits of the program to participating firms. These changes are discussed below.

A. Preconditions to Participation

Under the pilot program procedures, NFA is required to notify the Commission before it provides inquiry access to a firm and to obtain Commission approval before it provides direct entry access to a firm. Proposed Rule 801 would eliminate these notification and approval requirements. NFA will provide the Commission with quarterly updates to identify those firms with inquiry and direct entry access.³⁷

A further procedural modification proposed by NFA is a reduction in the time period that a firm must participate in Phase II prior to becoming eligible for participation in Phase III from ninety days to two weeks. NFA states that it takes approximately two weeks for a firm to demonstrate its proficiency at the data entry function. NFA would have the discretion to require a longer period of training for firms processing only a small number of applications during the two-week period.³⁸

Finally, Rule 801 will supplant the Direct Entry Agreement for firms filing information electronically by codifying in the rule the conditions of direct entry participation.³⁹ Consequently, following

³⁷ Submission at 14.

³⁸ NFA will make a determination in each case as to when a firm has demonstrated that it has become proficient at the data entry aspects of the program but in no event will a firm be moved from Phase II to Phase III prior to the completion of the two-week training period.

³⁹ Among other things, the Direct Entry Agreement requires that firms: (1) enter into NFA's MRRS database all information required to be filed on Forms 8-R, 3-R and 8-T for all APs of the participating firm and of the participating firm's guaranteed IBs for whom the participating firm has assumed registration responsibilities; (2) mail by first class mail or hand deliver to NFA, on the day that the firm enters a command in MRRS to process an application, the corresponding registration form with all required attachments; (3) adopt and enforce procedures to ensure the integrity and confidentiality of all individual filings; and (4) make its data entry personnel available for testimony in court, before the Commission, NFA or any contract market, in regard to the authenticity, integrity or accuracy of any paper or electronic filing covered by the agreement. The Direct Entry Agreement also requires that firms make certain certifications as part of its electronic filing as provided in Commission Rule 3.12(c)(1) (i)-(iv). The agreement further provides that the entry of an instruction by the participating firm to NFA to process an electronic filing constitutes a certification that the electronic filing accurately reflects the information on the paper filing and that the firm acknowledges that the willful submission of a false special certification constitutes cause for denial, suspension or revocation of the firm's registration under Sections 8a(2) and 8a(3) of the Act. In addition, the agreement provides that temporary licenses granted on the basis of an electronic filing shall terminate immediately upon notice to the firm that the paper filing was not

Continued

³⁴ Submission at 9. See also Description of Security Measures Presently in Use at National Futures Association's Data Center, Supplemental Submission to NFA's Petition for an Order Granting NFA Permission to Conduct a Pilot Program for the Direct Entry of Registration Data by a Sponsoring Registrant, July 16, 1990.

³⁵ For a more detailed description of the security procedures currently in place at NFA, see 55 FR 35925, 35932-35933 (September 4, 1990).

³⁶ NFA represents that there have been no instances of unauthorized access or attempts at such access or of any breach of security during the pilot program. Submission at 12.

the approval of Registration Rule 801, firms will not be required to sign the Direct Entry Agreement.

B. Line-by-Line Review

Under current procedures, NFA reviews for accuracy on a line-by-line basis all forms filed electronically by firms participating in Phases II and III of the program by comparing the electronic filing to the hard copy. As noted above, NFA proposes to revise this procedure such that upon completion of a firm's training period (Phase II), during which time NFA will continue to review all Forms 8-R on a line-by-line basis, NFA will perform a line-by-line comparison of only the information critical to the granting of a temporary license, the applicant's disciplinary history, which will be required to be submitted separately on the paper form provided by NFA. Other information would be spot-checked for accuracy. As noted above, during the nineteen months the pilot program has been in operation, NFA staff has made a line-by-line comparison of 2,172 registration forms, which revealed a total of 83 errors, only one of which was material.⁴⁰

As all information critical to temporary license eligibility will continue to be reviewed on a line-by-line basis, this procedural modification should not reduce the efficacy of the fitness screening process as it now exists. Reliability of registration data also should not be materially reduced. The data generated under the pilot program to date demonstrate the proficiency of the participating firms performing the data entry function and continuation of the line-by-line review of the information critical to the granting of a temporary license should be sufficient to assure data reliability.

C. Electronic Filing of All Forms

Under the current pilot program, participating firms are required to electronically enter every Form 8-R, Form 3-R, Form 8-T and Form U-5. NFA believed this requirement to be necessary in the early stages of the program in order to provide NFA staff with sufficient data for meaningful evaluation of the program. NFA states that it is no longer necessary to require that each participating firm file all of these forms electronically and proposes that participating firms have the option of filing either by mail or electronically.

received by NFA within five business days after the electronic filing or that the paper filing contains information different from the information in the electronic filing that indicates that the applicant does not qualify for a temporary license.

⁴⁰ See note 16 *supra*.

D. Elimination of Paper Filing Requirement

NFA notes that the single most important aspect of the direct entry program to its members is the reduction of the amount of paper filings with NFA. NFA reports that its members have emphasized that having to file hard copy forms with NFA after completing the electronic filing significantly reduces the benefits of the program. NFA recognizes that the elimination of all paper filings is not possible due to the potentially important role in judicial or administrative proceedings of the certifications contained in certain filing signed by individuals. As discussed above, Rule 801 would still require the submission of a hardcopy form containing the information that directly bears upon the individual's eligibility to become registered, *i.e.*, the disciplinary history information, certified by the applicant. By signing this paper form, the individual applicant certifies the truthfulness and completeness of the information on the form. Rule 801 will allow firms to file electronically the bulk of the information required by Form 8-R, which relates to the applicant's residential, employment and educational history, for AP applicants sponsored by the firm, without submitting a corresponding paper filing.⁴¹ Rule 801 also states that the registrant is deemed to make the certifications specified therein when it files the Form 8-R electronically. See note 24 *supra*.

Certain registration forms do not require individual certifications. Forms 8-T (notice of termination), U-5 (uniform termination notice for securities industry registration) and 3-R (except a Form 3-R amendment amending a Form 8-R) are certified by the firm and not the individual. The paper filing requirement with respect to these forms will be eliminated. The required certification for these forms is made when the firm directs the computer to process these forms due to the status accorded the electronic certification as a binding signature under proposed Rule 801. Although a Form 3-R updating a Form 8-R is certified by the individual registrant, the information certified on the Form 3-R is less likely to be critical to an individual's registration eligibility than the information on the original Form 8-

⁴¹ See letter dated August 27, 1992 from Daniel J. Roth, General Counsel, NFA, to Jean Webb, Secretary, CFTC and letter dated October 8, 1992 from Carol Wooding, Attorney, NFA to Mary Cademartori, Staff Attorney, Division of Trading and Markets.

R. The only circumstances in which information material to registration fitness would be involved is where an individual changed a "no" answer to a disciplinary history question to a "yes" answer by means of the Form 3-R. NFA notes that in this example, there is little likelihood that the change is not truthful and accurate due to the detrimental effect such change would have on the individual's registration status.⁴² Proposed Registration Rule 801, therefore, provides for Forms 3-R and 8-T filings to be made exclusively by means of electronic filings. The Commission notes, however, that if a disciplinary history question answer is being changed from "no" to "yes" this may require the filing of supplementary documents in hardcopy form.⁴³

NFA represents that elimination of the paper filing requirement for these forms will not impair NFA's ability to perform its delegated duties as the official custodian of the Commission's registration records or to provide accurate certifications concerning the authenticity and completeness of the records maintained. With respect to the forms for which electronic filing is substituted for paper filing, the computer records maintained in MRRS will constitute the registration record maintained on behalf of the Commission since there will be no hard copy form.⁴⁴ Furthermore, NFA will continue to certify the authenticity of the record and the accuracy of any computer printout.

The modifications of the direct entry program to reduce the number of paper filings have the potential to significantly reduce the number of paper filings received by NFA.⁴⁵ In the last year NFA received almost 14,000 Forms 3-R and more than 9,000 Forms 8-T. NFA notes that the elimination of the paper filing requirement for these forms is consistent with the Paperwork

⁴² As noted above, in the event that a firm erroneously entered data negatively affecting an AP's registration eligibility, NFA would undertake further review before taking any adverse registration action.

⁴³ The instructions to the Disciplinary History section of Form 8-R that if a person answers "yes" to any of the questions in that section, he must supply a certified copy of any applicable documents, such as any complaint, plea, order, agreement of settlement, verdict or other findings made, and sanctions or sentences imposed. If such documents are not obtainable must be furnished.

⁴⁴ See note 20 *supra*.

⁴⁵ NFA members who choose to prepare hard copy forms prior to completing the electronic filing will be required under NFA Compliance Rule 2-10 to maintain these forms as a business record. See also Commission Rules 3.12(e) and 1.31 (1992). NFA will not, however, require member firms to prepare and retain hard copies of these forms. See letter from Carol A. Wooding, Staff Attorney, NFA, to Mary Cademartori, Attorney, Division of Trading and Markets, CFTC, dated October 8, 1992.

Reduction Act. Further, NFA notes that the NASD is developing a program which will permit its member firms to file registration forms by computer without any follow-up paper filings.⁴⁶

E. Statistical Information

Under the pilot program, NFA is required to provide the Commission on a monthly basis with certain statistics to provide a factual basis for evaluation of the pilot program. Statistics classified by type of filing, phase of the program in which the filing was made, and firm, are provided with respect to the time required to grant temporary licenses to the APs of participating firms and to APs of non-participating firms, the average time between the electronic filing and NFA's receipt of the complete filing, and the number and type of material and non-material discrepancies between the electronic filing and paper filings.

NFA proposes to provide the Commission with similar statistics on a quarterly rather than on a monthly basis.⁴⁷ The Commission believes that quarterly statistics will provide it with sufficient opportunity to monitor and review the direct entry program and, after further experience is gained with the direct entry program, may consider further reduction of the frequency of statistical data filings.

IV. Benefits of Direct Entry

NFA submits that the direct entry pilot program has proved that the electronic filing of registration forms has benefitted both the futures industry and the public without any negative impact on the registration process. Benefits cited include a significant decrease in the time within which temporary licenses for AP applicants are granted and reduction in the number of NFA staff required to process registration filings, permitting reallocation of staff to customer protection efforts and

potentially leading to cost savings that could be reflected in reduced registration fees. The modifications of the program set forth herein should increase the efficiency of the registration process and reduce costs.⁴⁸

Conclusion and Order

Based upon the foregoing, the Commission believes that the direct entry program can be implemented in a manner consistent with NFA's registration responsibilities under prior Commission orders and with the required degree of accuracy, reliability and security for NSFA registration processing and fitness screening.

Accordingly, pursuant to sections 8a(1), 8a(10), 17(j) and 17(o) of the Commodity Exchange Act, 7 U.S.C. 12a(1), 12a(10), 21(j) and 21(o) (1988), the Commission hereby authorizes NFA to put into effect NFA Registration Rule 801, which implements the direct entry program as described herein, subject to the conditions set forth below:

a. The direct entry pilot program is described in NFA's Submission dated July 9, 1992, as supplemented by submissions dated August 27, 1992, October 8, 1992, November 13, 1992, November 25, 1992 and December 8, 1992. The representations set forth in the foregoing submissions, as well as those contained in the Commission September 4, 1990 Order authorizing NFA to implement Phases II and III of the direct entry pilot program, as modified by the foregoing submissions, constitute the responsibilities of NFA unless otherwise stated or modified by this order.

b. In addition to providing the statistics described herein on a quarterly basis, NFA will provide the Commission with such data as may be requested from time to time concerning the direct entry program.

Issued in Washington, DC on December 16, 1992, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 92-30922 Filed 12-21-92; 8:45 am]

BILLING CODE 8361-01-M

DEPARTMENT OF DEFENSE

Department of the Air Force

USAF Scientific Advisory Board; Meeting

The Architecture & Assessment Panel of the USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 11 January 1993, at Langley AFB, VA from 8 a.m. to 5 p.m.

⁴⁶ The Commission has previously allowed the substitution of electronic filings for paper filings in the context of large trader reporting. See CFR 17.00(a)(1) and 17 CFR 17.02(a) (1992).

The purpose of this meeting will be to receive briefings and gather information on issues related to theater air defense.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31019 Filed 12-21-92; 8:45 am]

BILLING CODE 3610-01-M

USAF Scientific Advisory Board; Meeting

The Boost Phase Panel of the USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 22 January 1993, at the RAND Corporation, 1700 Main Street, Santa Monica, CA from 8 a.m. to 5 p.m.

The purpose of this meeting will be to receive briefings and gather information on issues related to theater air defense.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31015 Filed 12-21-92; 8:45 am]

BILLING CODE 3610-01-M

USAF Scientific Advisory Board; Meeting

The C3 Panel of the USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 27 January 1993, at The ANSER Corporation, 1215 Jefferson Davis Highway, Arlington, VA from 8 a.m. to 5 p.m.

The purpose of this meeting will be to receive briefings and gather information on issues related to theater air defense through the year 2020.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31021 Filed 12-21-92; 8:45 am]

BILLING CODE 3610-01-M

⁴⁶ Currently, the NASD permits the electronic filing of all Form U-4s for the transfer of account representatives. The member firm must submit the hard copy of the Form U-4 and the fingerprint card within twenty-one days of the electronic filing. The NASD is developing a proposal to permit member firms to file transfer applications electronically without having to follow-up with the hard copy U-4. NASD also is in the process of implementing a procedure for electronic filing of updates of Form U-4 without submitting paper follow-ups. Currently, this is permitted for page one of Form U-4. NASD is in the process of implementing this procedure for pages two through four of Form U-4. NASD permits its member firms to file employee terminations electronically without follow-up paper filings.

⁴⁷ See 55 FR 35925, 35928 (September 4, 1990). In a telephone conversation with Division staff on October 14, 1992, Daniel Roth, NFA's General Counsel, represented to the Division that NFA will provide these statistics on a quarterly basis.

**USAF Scientific Advisory Board;
Meeting**

The Cruise Missile Panel of the USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 19 January 1993, at The ANSER Corporation, 1215 Jefferson Davis Highway, Arlington, VA from 8 a.m. to 5 p.m.

The purpose of this meeting will be to receive briefings and gather information on issues related to theater air defense.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31016 Filed 12-21-92; 8:45 am]

BILLING CODE 3910-01-M

**USAF Scientific Advisory Board;
Meeting**

The USAF Scientific Advisory Board's Information Architecture That Enhance Operational Capability In Peacetime and Wartime Committee will meet on 13-15 January 1993 from 8 a.m. to 5 p.m. at ANSER Corporation, Arlington, VA.

The purpose of this meeting is to receive briefings, hold discussions and begin report writing on projects related to Information Architectures. This meeting will involve discussions of classified defense matters listed in section 552b(c) of title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-30955 Filed 12-21-92; 8:45 am]

BILLING CODE 3910-01-M

**USAF Scientific Advisory Board;
Meeting**

The Mid Course Panel of the USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 14 January 1993, at The ANSER Corporation, 1215 Jefferson Davis Highway, Arlington, VA from 8 a.m. to 5 p.m.

The purpose of this meeting will be to receive briefings and gather information on issues related to theater air defense.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31017 Filed 12-21-92; 8:45 am]

BILLING CODE 3910-01-M

**USAF Scientific Advisory Board;
Meeting**

The USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 12-13 January 1993, at The ANSER Corporation, 1215 Jefferson Davis Highway, Arlington, VA from 8 a.m. to 5 p.m.

The purpose of this meeting will be to receive briefings and gather information on issues related to theater air defense.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31018 Filed 12-21-92; 8:45 am]

BILLING CODE 3910-01-M

**USAF Scientific Advisory Board;
Meeting**

The Pre-Launch Panel of the USAF Scientific Advisory Board's Committee on Options for Theater Air Defense will meet on 5 January 1993, at Lincoln Laboratories, Bedford, MA from 8 a.m. to 5 p.m.

The purpose of this meeting will be to gather information on issues related to theater air defense capabilities, and requirements for theater air defense through the year 2020.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31022 Filed 12-21-92; 8:45 am]

BILLING CODE 3910-01-M

**USAF Scientific Advisory Board;
Meeting**

The USAF Scientific Advisory Board's Space Mission Panel will meet on 27-28 January 1993, at AFSPACECOM, Colorado Springs, CO from 8 a.m. to 5 p.m.

The purpose of this meeting will be to receive space related briefings and to prepare advice for AFSPACECOM Commander.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92-31020 Filed 12-21-92; 8:45 am]

BILLING CODE 3910-01-M

DEPARTMENT OF ENERGY**Pittsburgh Energy Technology Center;
Notice of Non-Competitive Financial
Assistance Award**

AGENCY: Bartlesville Project Office and Pittsburgh Energy Technology Center, U.S. Department of Energy.

ACTION: Notice of Non-Competitive Financial Assistance (Grant) Award with the American Geological Institute.

SUMMARY: The U.S. Department of Energy (DOE), Bartlesville Project Office (BPO) announces that pursuant to 10 CFR 600.7(b)(2)(i) criterion (H), it intends to make a non-competitive Financial Assistance (Grant) award through the Pittsburgh Energy Technology Center to the American Geological Institute for a four month feasibility study, which will include a feasibility and assessment study for the establishment of a national geoscience data repository.

ADDRESSES: U.S. Department of Energy, Pittsburgh Energy Technology Center, Acquisition and Assistance Division, P.O. Box 10940, MS 921-118, Pittsburgh, PA 15236-0940.

FOR FURTHER INFORMATION CONTACT: John R. Columbia, Contract Specialist, (412) 892-6219.

SUPPLEMENTARY INFORMATION:
Grant No.: DE-FG22-93BC14968
Title of Research Effort: "National Geoscience Data Repository"
Awardee: American Geological Institute
Term of Assistance Effort: Four (4) months

Cost of Assistance Effort: The total estimated value is \$136,360.

Objective: Based upon the authority of 10 CFR 600.7(b)(2)(i) criterion (H), the objective of this Grant is to permit the American Geological Institute to conduct the assessment and feasibility study that would document the quantity and quality of geological and geophysical data available for transfer to a national Geoscience Data Repository. The results of this effort will contribute to the achievement of the overall goals of the DEO Program in establishing a repository of data which will aid in identifying specific technology transfer methods in order to provide a critical new source of information for independent oil and gas producers and in meeting the National Energy Strategy goal of arresting the U.S. vulnerability to oil supply disruptions by increasing the domestic crude oil resource base.

Dated: December 9, 1992.

Dale A. Siciliano,
Contracting Officer.

[FR Doc. 92-30988 Filed 12-21-92; 8:45 am]

BILLING CODE 6450-01-M

**Pittsburgh Energy Technology Center;
Non-Competitive Financial Assistance
Award**

AGENCY: Bartlesville Project Office and Pittsburgh Energy Technology Center, U.S. Department of Energy.

ACTION: Notice of non-competitive financial assistance (grant) award with ParaMagnetic Logging, Inc.

SUMMARY: The U.S. Department of Energy (DOE), Bartlesville Project Office (BPO) announces that pursuant to 10 CFR 600.7(b)(2)(i) (A) and (D), it intends to make a Non-Competitive Financial Assistance (Grant) Award through the Pittsburgh Energy Technology Center to ParaMagnetic Logging, Inc. for the continuation of their effort entitled "Fabrication and Downhole Testing of Moving Through Casing Resistivity Apparatus".

ADDRESSES: Department of Energy, Pittsburgh Energy Technology Center, Acquisition and Assistance Division, P.O. Box 10940, MS 921-118, Pittsburgh, PA 15236-0940.

FOR FURTHER INFORMATION CONTACT: Eric T. Bell, Contract Specialist, (412) 892-5802.

SUPPLEMENTARY INFORMATION:

Grant No.: DE-FG22-93BC14966

Title of Research Effort: "Fabrication and Downhole Testing of Moving Through Casing Resistivity Apparatus"

Awardee: ParaMagnetic Logging, Inc.

Term of Assistance Effort: Twelve (12) months

Cost of Assistance Effort: The total estimated value is \$822,435. The DOE share is anticipated at \$109,000. The remaining portion of \$713,435 will be funded by the Gas Research Institute.

Objective: Based upon the authority of 10 CFR 600.7(b)(2)(i) (A) and (D), the objective of this Grant is for ParaMagnetic Logging, Inc. to continue research fabrication and downhole testing of an apparatus that continuously measures resistivity while moving through well casing. The studies offer technology that will allow operators to go back into oil wells and inexpensively evaluate the well bore for additional missed oil and gas potential left behind in the pipe. Fabrication and downhole testing of the Moving Thorough Casing Resistivity Apparatus is the main objective of this grant. The results of much of this research will be useful for locating and recovering bypassed oil and gas and further recovery evaluations.

The intended research will:

- (1) Finish the fabrication of the Second Type Moving Through Casing Resistivity Apparatus ("MTCRA"),
- (2) Test the operation principle of the Slider Method of Measurement,
- (3) Analyze and verify that the data obtained using the Second Type MTCRA reproduced open-hole laterlogs,
- (4) Test and debug the up-hole electronics and the Second Type MTCRA,
- (5) Log a cased well and reproduce open-hole laterlogs, and
- (6) Verify data against open-hole logs and transfer the learned technology.

Dated: December 9, 1992.

Richard D. Rogus,
Contracting Officer.

[FR Doc. 92-30989 Filed 12-21-92; 8:45 am]

BILLING CODE 6450-01-M

**Morgantown Energy Technology
Center**

**Financial Assistance Award;
Cooperative Agreement**

AGENCY: Morgantown Energy Technology Center, DOE.

ACTION: Notice of noncompetitive financial assistance application for a cooperative agreement.

SUMMARY: Based upon a determination pursuant to 10 CFR 600.7(b)(2), the DOE Morgantown Energy Technology Center gives notice of its plans to award a five year Cooperative Agreement to the University of Wyoming's Western

Research Institute, Laramie Wyoming, in the approximate amount of \$10,000,000.

FOR FURTHER INFORMATION CONTACT: Thomas L. Martin, U.S. Department of Energy, Morgantown Energy Technology Center, P.O. Box 880, Morgantown, WV 26507-0880. Telephone: (304) 291-4087. Cooperative Agreement No.: DE-FC21-93MC30126.

SUPPLEMENTARY INFORMATION: The DOE will fund the allowable costs of the Cooperative Agreement. The pending award is based on an application for renewal of a portion of work begun under a Cooperative Agreement presently being funded by DOE. The work to be continued under this renewal will address: Oil and gas research to advance technologies of petroleum and gas production processes and to develop methods for cleanup of wastes. Advanced systems applications to develop and evaluate improved process systems for utilization of fossil fuels. Environmental technologies needed for remediation and waste management related to fossil energy utilization. Applied energy science to understand and evaluate applied energy technologies. The work is necessary to ensure continuity of the work currently being performed.

Issued: December 14, 1992.

Randolph L. Kesling,
Acting Director, Acquisition and Assistance Division, Morgantown Energy Technology Center.

[FR Doc. 92-30991 Filed 12-21-92; 8:45 am]

BILLING CODE 6450-01-M

**Morgantown Energy Technology
Center; Financial Assistance Award
(Cooperative Agreement)**

AGENCY: Morgantown Energy Technology Center, Department of Energy (DOE).

ACTION: Notice of noncompetitive financial assistance application for a cooperative agreement.

SUMMARY: Based upon a determination pursuant to 10 CFR 600.7(b)(2), the DOE Morgantown Energy Technology Center gives notice of its plans to award a five year Cooperative Agreement to the University of Wyoming's Western Research Institute, in Laramie Wyoming, in the approximate amount of \$25,000,000.

FOR FURTHER INFORMATION CONTACT: Thomas L. Martin, U.S. Department of Energy, Morgantown Energy Technology Center, P.O. Box 880, Morgantown, WV 26507-0880. Telephone: (304) 291-

4087. Cooperative Agreement No.: DE-FC21-93MC30127.

SUPPLEMENTARY INFORMATION: The DOE will fund the allowable costs of the Cooperative Agreement. The pending award is based on an application for renewal of a portion of work begun under a Cooperative Agreement presently being funded by DOE. The work to be continued under this renewal will address the Jointly Sponsored Research Program. Under this program the participant will solicit research opportunities in conjunction with private industry which will enhance the fossil energy mission. The work is necessary to ensure continuity of the work currently being performed.

Dated: December 14, 1992.

Randolph L. Kesling,

Acting Director, Acquisition and Assistance Division, Morgantown Energy Technology Center.

[FR Doc. 92-30990 Filed 12-21-92; 8:45 am]

BILLING CODE 6450-01-M

Advisory Committee To Develop On-Site Innovative Technologies for Environmental Restoration and Waste Management; Notice of Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770), notice is hereby given of the following Advisory Committee meeting:

Name: Federal Advisory Committee to Develop On-Site Innovative Technologies for Environmental Restoration and Waste Management (DOIT Committee).

Date and Time: January 5, 1993 1 p.m. to 4:30 p.m.

Place: Hyatt Regency, 1750 Welton Street, Denver, Colorado 80202.

Contact: Dr. Clyde Frank, Deputy Assistant Secretary, Technology Development, EM-50, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6382.

Purpose of the Committee: The DOIT Committee will serve as the primary vehicle for recommending a program that can be adopted to implement a Memorandum of Understanding (MOU) regarding Environmental Restoration and Waste Management in western states. This memorandum of understanding was signed in July 1991 by representatives from the U.S. Departments of Defense, the Interior, and Energy, the U.S. Environmental Protection Agency and the Western Governors' Association (WGA) the latter representing twenty western states and territorial governors. The DOIT Committee will help to improve Federal environmental restoration and waste

management efforts by identifying technology needs at Federal facilities in western states; identifying/assessing emerging technologies within the Federal and private sectors; identifying regulatory, institutional, or other government barriers to technology development; and identifying workforce planning/education requirements.

Agenda

Tuesday, January 5, 1993

12 p.m.—Lunch

1 p.m.—Dr. Clyde Frank, Designated Federal Official for the DOIT Committee Opens Meeting

1:15 p.m.—Briefing from DOD representative on status of DOD, DOE, EPA proposal to the Strategic Environmental Research and Development (SERDP) Science Advisory Board

1:45 p.m.—Discussion of need for and authorization to establish interagency/state staff coordinating group for support purposes

2:15 p.m.—Discussion of requirements for a public stakeholder participation plan as called for in the DOIT charter

2:45 p.m.—Discussion of need for and authorization to establish public stakeholder work groups

3:15 p.m.—Break

3:30 p.m.—Public Comment Session

4:30 p.m.—Meeting Adjourns

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Dr. Clyde Frank's office at the address or telephone number listed above. Such statements will be subject to a 10 minute rule. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. The Committee Chairperson is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on December 17, 1992.

Marcia L. Morris,

Deputy Advisory Committee, Management Officer.

[FR Doc. 92-30986 Filed 12-21-92; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

Application Tendered for Filing With the Commission

December 16, 1992.

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection.

a. **Type of Application:** Exemption from Licensing.

b. **Project No.:** 11365-000.

c. **Date filed:** December 2, 1992.

d. **Applicant:** Swan Falls Corporation.

e. **Name of Project:** Swan Falls Hydroelectric Project.

f. **Location:** On the Saco River in Oxford County, Maine.

g. **Filed Pursuant to:** Federal Power Act 16 U.S.C. 791 (a)-825(r).

h. **Applicant Contact:** Lawrence J. Keddy, 5 Gambo Road, P.O. Box 40, South Windham, Maine 04082-0040, (202) 892-4000.

i. **FERC Contact:** Mary C. Golato (202) 219-2804.

j. **Comment Date:** January 31, 1993.

k. **Description of Project:** The proposed project consists of the following features: (1) An existing dam approximately 630 feet long and 10 feet high; (2) an existing impoundment with a surface area of 150 acres, a length of 4.1 miles, and a storage capacity of 450 acre-feet; (3) an existing powerhouse containing one operable and two proposed turbine-generator units, thus increasing the installed capacity of the project from 350 to 820 kilowatts; (4) an existing 34.5-kilovolt transmission line; and (5) appurtenant facilities. The applicant estimates that the total average annual generation would be 4 million kilowatthours.

1. Pursuant to § 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the filing date and serve a copy of the request on the applicant.

Lois D. Cahell,
Secretary.

[FR Doc. 92-30938 Filed 12-21-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER93-55-000]

Southern California Edison Co.; Filing

December 16, 1992.

Take notice that on November 19, 1992, Southern California Edison Company (SCE) tendered for filing an amendment to its October 30, 1992 filing in this docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before December 28, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

[FR Doc. 92-30996 Filed 12-21-92; 8:45 am]
BILLING CODE 6717-01-M

Office of Arms Control and Nonproliferation Policy

Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Use of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Sweden concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangements to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/EU(SW)-84, for the transfer of 150 grams of uranium depleted in the isotope uranium-235 from Sweden to France for chemical analysis.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

Issued in Washington, DC on December 17, 1992.

Salvador N. Ceja,
Acting Director, Office of Nonproliferation Policy.

[FR Doc. 92-30987 Filed 12-21-92; 8:45 am]
BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4547-8]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data instrument.

DATE: Comments must be submitted on or before January 11, 1993.

FOR FURTHER INFORMATION OR A COPY OF THIS ICR CONTACT: Sandy Farmer at EPA, (202) 260-2740.

SUPPLEMENTARY INFORMATION:

Office of Air and Radiation

Title: (EPA ICR #1614.01). This ICR requests approval for a new collection.

Abstract: Green Lights is a voluntary EPA program that encourages organizations to adopt energy efficient lighting as a profitable means of preventing pollution and improving lighting quality. Green Lights "Partners" include corporations, state and local governments, colleges and universities, and other private and public organizations. Green Lights "Allies" include lighting manufacturers, lighting service providers, and utilities.

All participants in the Green Lights program must complete, sign, and submit to EPA a Memorandum of Understanding (MOU) that outlines the responsibilities of both the Green Lights participant and EPA. The MOU commits a Green Lights participant to survey all of its U.S. facilities and consider a full set of lighting options that maximize energy savings while being profitable

and not compromising lighting quality. The participant agrees to complete lighting upgrades within five years of signing the MOU in 90 per cent of the square footage of its facilities that meet these criteria. EPA needs to collect initial information in the MOU to formally establish participation in the Green Lights program and to obtain general information on Green Lights participants. EPA uses this information to identify a Green Light implementation manager at the participating organization and to obtain initial data on the size and type of buildings subject to the Green Lights agreement.

Upon completion of a lighting upgrade (or annually if the project is not completed within one year), all Green Lights participants complete and submit to EPA an implementation progress report that documents energy efficiency improvements and cost savings. The information provided includes the fixture, lamp, and ballast types, lighting controls, maintenance methods and implementation methods most commonly utilized. EPA needs information on implementation to evaluate each participant's progress in meeting Green Lights commitments and to determine if there is a need to provide technical or other assistance to that participant in completing their upgrades. In addition, overall program progress must be evaluated to determine aggregate energy savings and pollution prevention.

In addition to agreeing to survey lighting and implement upgrades, Green Lights Allies work with EPA to increase awareness of the benefits of energy efficient lighting and to develop a technical support program. Specifically, they agree to provide case studies of successful energy efficient lighting investments and provide EPA, upon request, with information on the lighting related products and/or services that the organization offers. EPA uses this information to develop a directory and provide program participants with this information.

Burden Statement: The public reporting burden for this collection of information will vary, depending upon whether the respondent is a Green Lights Partner or a Green Light Ally and the length of time the respondent has participated in the Green Lights program.

Respondents: Green Light Partners include corporations, state and local governments, colleges and universities, and other organizations, while Green Lights Allies include lighting manufacturers, lighting management companies, and utilities.

Estimated Number of Respondents: There are currently 624 participants in the Green Lights program. EPA expects the program to expand by approximately 240 new participants per year for the period covered by this ICR.

Estimated Total Annual Burden of Respondents: The estimated total annual burden of respondents will vary, depending on whether the respondent is a Green Lights Partner or Green Lights Ally and the length of time the respondent has participated in the Green Lights program.

Frequency of Collection: The Memorandum of Understanding (MOU) is completed and submitted once, upon joining the Green Lights program. The implementation progress report is submitted upon project completion or annually if the project is not completed within one year. Case studies and other information on products and services from lighting manufacturers, lighting service providers, and utilities are obtained upon joining the Green Lights program.

Send comments regarding the burden estimate or any other aspect of this information collection, including suggestions for reducing the burden, to: Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street, SW., Washington, DC 20460, and Troy Hillier, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20530.

Dated: December 11, 1992.

Edward Callahan,

Acting Director, Office of Atmospheric Programs.

[FR Doc. 92-31013 Filed 12-21-92; 8:45 am]
BILLING CODE 6560-60-M

[OPPT-59315A; FRL-4180-2]

Certain Chemicals; Approval of a Test Marketing Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of an application for test marketing exemption (TME) under section 5(h)(1) of the Toxic Substances Control Act (TSCA) and 40 CFR 720.38. EPA has designated this application as TME-93-3. The test marketing conditions are described below.

EFFECTIVE DATE: (December 8, 1992).

FOR FURTHER INFORMATION CONTACT: Edna G. Pleasants, New Chemicals

Branch, Chemical Control Division (TS-794), Office of Pollution Prevention and Toxics Environmental Protection Agency, Rm. E-611, 401 M St. SW., Washington, DC 20460, (202) 260-7800.

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes if the Agency finds that the manufacture, processing, distribution in commerce, use, and disposal of the substances for test marketing purposes will not present an unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present an unreasonable risk of injury.

EPA hereby approves TME-93-3. EPA has determined that test marketing of the new chemical substance described below, under the conditions set out in the TME application, and for the time period and restrictions specified below, will not present an unreasonable risk of injury to health or the environment. Production volume, use, and the number of customers must not exceed that specified in the application. All other conditions and restrictions described in the application and in this notice must be met.

The following additional restrictions apply to TME-93-3. A bill of lading accompanying each shipment must state that the use of the substance is restricted to that approved in the TME. In addition, the applicant shall maintain the following records until 5 years after the date they are created, and shall make them available for inspection or copying in accordance with section 11 of TSCA:

1. Records of the quantity of the TME substance produced and the date of manufacture.
2. Records of dates of the shipments to each customer and the quantities supplied in each shipment.
3. Copies of the bill of lading that accompanies each shipment of the TME substance.

TME-93-3

Date of Receipt: October 30, 1992.

Notice of Receipt: November 17, 1992 (57 FR 54233).

Applicant: Confidential.

Chemical: (G) Aliphatic Polyamide.

Use: (S) Hot Melt for Bonding Industrial Parts.

Production Volume: Confidential.

Number of Customers: Confidential.

Test Marketing Period: Five (5) months, commencing on the first day of nonexempt commercial manufacture.

Risk Assessment: EPA identified no significant health or environmental concerns for the test market substance. Therefore, the test market activities will not present any unreasonable risk of injury to health or the environment.

The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information that comes to its attention cast significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to health or the environment.

Dated: December 8, 1992.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92-31008 Filed 12-21-92; 8:45 am]
BILLING CODE 6560-60-F

[FRL-4547-7]

Water Pollution Control; Sole Source Aquifer Determinations; MO

ACTION: Notice of decision to deny sole source aquifer petition.

Notice is hereby given that, pursuant to section 1424(e) of the Safe Drinking Water Act, the U.S. Environmental Protection Agency (EPA) Region 7 Administrator is denying the petition submitted by the National Park Service to designate the Big Spring Recharge Area as a Sole Source Aquifer. The Big Spring Recharge Area encompasses portions of Shannon, Carter, Oregon, Howell, and Ripley counties in south-central Missouri.

Based on an extensive review of the water resources in the area, and a thorough review of alternative water supplies, EPA has determined that alternative sources of drinking water are available to residents living in the petitioned area. A Decision Support Document is available upon request.

For more information, contact J. Patrick Costello, geologist, Office of Groundwater Protection, EPA Region 7, 726 Minnesota Avenue, Kansas City, Kansas 66101, phone (913) 551-7407.

Dated: December 15, 1992.

Morris Kay,

Regional Administrator, EPA, Region VII.

[FR Doc. 92-31014 Filed 12-21-92; 8:45 am]
BILLING CODE 6560-60-M

FEDERAL COMMUNICATIONS COMMISSION**Public Information Collection Requirement Submitted to Office of Management and Budget for Review**

December 15, 1992.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, Downtown Copy Center, 1990 M Street, NW., suite 640, Washington, DC 20036, (202) 452-1422. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395-4814.

OMB Number: None.

Title: FM Broadcast Station Self-Inspection Survey

Action: New Collection

Respondents: Non-profit institutions and businesses or other for-profit (including small businesses)

Frequency of Response: Each station will be surveyed every five years

Estimated Annual Burden: 1,220 responses; 8 hours average burden per response; 9,760 hours total annual burden

Needs and Uses: Collection of this information is needed to establish and maintain the highest rate of compliance possible in the FM Broadcast Service and to educate licensees about current FCC Rules, specifically those with which strict compliance is expected. Due to limited resources available to the Commission field offices, traditional broadcast station inspections have occurred less frequently. The self-inspection method of collecting the data reduces the need to make regular field inspections to determine compliance. The information will be used by the FCC to gauge compliance with its rules. Without such information, the FCC will be unable to make accurate determinations of overall compliance rates and unable to identify trends in compliance.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

R Doc. 92-30967 Filed 12-21-92; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL RESERVE SYSTEM**Century Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 15, 1993.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *Century Bancorp, Inc.*, Milledgeville, Georgia; to become a bank holding company by acquiring 100 percent of the voting shares of Century Bank and Trust, Milledgeville, Georgia.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Shelby County Bancorp, Inc.*, Shelbyville, Illinois; to acquire 100 percent of the voting shares of Bank of Findlay, Findlay, Illinois.

C. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Area Bancshares Corporation*, Owensboro, Kentucky; to acquire 100 percent of the voting shares of Commonwealth Bancorp, Glasgow, Kentucky, and thereby indirectly acquire Bowling Green Bank & Trust Company, N.A., Bowling Green, Kentucky, and New Farmers National Bank, Glasgow, Kentucky.

2. *Mercantile Bancorporation, Inc.*, St. Louis, Missouri; to acquire 100 percent

of the voting shares of First National Bank of Flora, Flora, Illinois.

3. *Union Planters Corporation*, Memphis, Tennessee; to acquire 100 percent of the voting shares of First State Bancshares, Inc., Somerville, Tennessee, and thereby indirectly acquire First State Bank of Fayette County, Somerville, Tennessee.

4. *Union Planters - FSB Acquisition Company*, Memphis, Tennessee; to become a bank holding company by acquiring First State Bancshares, Inc., Somerville, Tennessee, and thereby indirectly acquire First State Bank of Fayette County, Somerville, Tennessee.

D. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Central Service Corporation*, Enid, Oklahoma; to acquire 100 percent of the voting shares of Ponca Bankshares, Inc., Ponca City, Oklahoma, and thereby indirectly acquire 84.07 percent of the voting shares of Security Bank & Trust Company, Ponca City, Oklahoma. In connection with this application, CSC Merger, Inc., a nonoperating subsidiary of Central Service Corporation, will become a bank holding company as the survivor of a merger with Ponca Bankshares, Inc., and will directly own 84.07 percent of the voting shares of Security Bank & Trust Company.

E. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *First Bancshares of Delaware, Inc.*, Wilmington, Delaware; to become a bank holding company by acquiring 83.8 percent of the voting shares of The Hamilton National Bank, Hamilton, Texas, and Bank of Tyler, Tyler, Texas.

F. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. *The Sumitomo Bank, Limited*, Osaka, Japan; to acquire shares in order to maintain its current 13.73 percent interest in the voting shares of CPB, Inc., Honolulu, Hawaii, and thereby indirectly acquire Central Pacific Bank, Honolulu, Hawaii.

Board of Governors of the Federal Reserve System, December 16, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31034 Filed 12-21-92; 8:45 am]

BILLING CODE 6210-01-F

First of America Bank Corporation, et al.; Notice of Applications to Engage de novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 11, 1993.

A. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *First of America Bank Corporation*, Kalamazoo, Michigan; to engage *de novo* through its subsidiary, *First of America Mortgage Company*, Kalamazoo, Michigan, in performing appraisals of real estate, pursuant to § 225.25(b)(13) of the Board's Regulation Y.

B. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Newberry Bancorp, Inc.*, Sault Ste. Marie, Michigan; to engage *de novo* through its subsidiary, *Northern Michigan Bidco, Inc.*, Sault Ste. Marie, Michigan, in community development activities, pursuant to § 225.25(b)(6) of the Board's Regulation Y.

C. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. *The Sanwa Bank, Limited*, Tokyo, Japan; to engage *de novo* through its subsidiary, *Sanwa-BKG Futures Inc.*, Chicago, Illinois, in the execution and clearance of, and provision of advisory services with respect to, trades in the NIKKEI Stock Average futures contracts and options thereon on the Chicago Mercantile exchange, pursuant to §§ 225.25(b)(18) and (19) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 16, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31035 Filed 12-21-92; 8:45 am]

BILLING CODE 6210-01-F

Paul Douglas Freedle, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 11, 1993.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *Paul Douglas Freedle*, Tampa, Florida; to acquire 60.74 percent of the voting shares of *Public Bank Corporation*, Saint Cloud, Florida, and thereby indirectly acquire *Public Bank*, Saint Cloud, Florida.

2. *Edwin Joseph Leonards*, Morganza, Louisiana; to acquire an additional

18.33 percent of the voting shares of *Great Guaranty Bancshares, Inc.*, New Roads, Louisiana, for a total of 18.39 percent, and thereby indirectly acquire *Team Bank & Trust Company*, New Roads, Louisiana.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Terry M. Carley*, to acquire an additional 91.1 percent of the voting shares of *Avoca Financial Services, Inc.*, Avoca, Iowa, for a total of 100 percent, and thereby indirectly acquire *Peoples National Bank*, Avoca, Iowa.

2. *James F. Schwertley*, Missouri Valley, Iowa; *Donald F. Schwertley*, Council Bluffs, Iowa; and *James R. King*, Mondamin, Iowa; to acquire 80.1 percent of the voting shares of *Overton Bank Shares, Inc.*, Mondamin, Iowa, and thereby indirectly acquire *Mondamin Savings Bank*, Mondamin, Iowa.

3. *Marvin R. Selden, Jr.*, *Melvin H. Nielsen*, *Dennis L. Gallagher*, *Robert F. McLaughlin* and *Doris R. Olson*, as trustees for the *Hugh N. Gallagher Trust*; to acquire 55.86 percent of the voting shares of *Iowa State Bank Holding Company*, Des Moines, Iowa, and thereby indirectly acquire *Iowa State Bank*, Des Moines, Iowa.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *William Cotulla*, Cotulla, Texas, to acquire an additional 14.37 percent, for a total of 17.02 percent; *Carl Huddleston*, Cotulla, Texas, to acquire an additional 7.18 percent, for a total of 7.94 percent; *Andrew Lewis, III*, San Antonio, Texas, to acquire an additional 14.37 percent, for a total of 17.63 percent; *Daniel Kinsel, III*, Cotulla, Texas, to acquire an additional 14.37 percent, for a total of 17.40 percent; and *John Northcut*, Cotulla, Texas, to acquire an additional 14.37 percent, for a total of 16.83 percent, of the voting shares of *Stockmens Financial Corporation*, Cotulla, Texas, and thereby indirectly acquire *Stockmens National Bank*, Cotulla, Texas.

2. *Fred Ronnie Myrick*, Monroe, Louisiana, and *Joe Kenneth Newton*, Ruston, Louisiana; to acquire 7.73 percent of the voting shares of *First Capital Bancorp, Inc.*, Delhi, Louisiana, for a total of 20.43 percent, and thereby indirectly acquire *Capital Bank*, Delhi, Louisiana.

Board of Governors of the Federal Reserve System, December 16, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31036 Filed 12-21-92; 8:45 am]

BILLING CODE 6210-01-F

Resource Bancshares Corporation, et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than January 15, 1993.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Senior Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *Resource Bancshares Corporation*, Columbia, South Carolina; to acquire

Resource Mortgage Group, Inc., Columbia, South Carolina, and thereby engage in the purchase, sale and servicing of residential first mortgage loans, and the purchase and sale of servicing rights associated with such loans; servicing of mortgage loans in its portfolio and of loans held by third parties as to which the company will own servicing rights or will have a contractual obligation to perform servicing; and collection of past due accounts, pursuant to §§ 225.25(b)(1) and (23) of the Board's Regulation Y.

B. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *SunTrust Banks, Inc.*, Atlanta, Georgia, and *Sun Banks, Inc.*, Orlando, Florida; to acquire *Coast Bank, Federal Savings Bank, Sarasota, Florida*, and thereby engage in operating a savings association, pursuant to § 225.25(b)(9) of the Board's Regulation Y.

C. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Valley Bancorporation*, Appleton, Wisconsin; to acquire *Valley Securities, Inc.*, Appleton, Wisconsin, and thereby engage in full service securities brokerage activities, pursuant to § 225.25(b)(15) of the Board's Regulation Y.

D. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Norwest Corporation*, Minneapolis, Minnesota; to acquire *Norwest Insurance Wyoming, Inc.*, Wheatland, Wyoming, and thereby engage in general insurance agency activities, pursuant to § 225.25(b)(8)(vii) of the Board's Regulation Y. **Comments on this application must be received by January 5, 1993.**

E. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Brooke Holdings, Inc.*, Jewell, Kansas, parent of *Brooke Corporation*, Jewell, Kansas; to indirectly acquire *Smith Insurance Agency, Inc.*, Beloit, Kansas, through *Brooke Agency, Inc.*, a nonbank subsidiary, and thereby engage in insurance activities, pursuant to § 225.25(b)(8)(vi) of the Board's Regulation Y. **Comments on this application must be received by January 5, 1993.**

Board of Governors of the Federal Reserve System, December 16, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31037 Filed 12-21-92; 8:45 am]

BILLING CODE 6210-01-F

United Missouri Bancshares, Inc., et al.; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company has also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of

Governors not later than January 15, 1993.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *United Missouri Bancshares, Inc.*, Kansas City, Missouri, and United Subsidiary, Inc., Kansas City, Missouri; to acquire CNB Financial Corporation, Kansas City, Kansas, and thereby indirectly acquire Commercial National Bank, Kansas City, Kansas; First Bank and Trust, N.A., Concordia, Kansas; City National Bank, Atchison, Kansas; and Security State Bank, Fort Scott, Kansas.

In connection with this application, Applicants will also acquire Monetary Transfer Systems, Inc., St. Louis, Missouri, and thereby engage in providing ATM-relating data processing services to banks pursuant to § 225.25(b)(7) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 16, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31038 Filed 12-21-92; 8:45 am]

BILLING CODE 6210-01-F

GENERAL SERVICES ADMINISTRATION

[G-92-2]

Delegation of Authority to the Attorney General

Pursuant to the authority vested in me by section 3726 of title 31, United States Code, I have determined that it is both cost-effective and in the public interest to delegate authority to the Attorney General to conduct a prepayment audit of domestic and foreign household goods/personal effects transportation; overseas transportation of privately owned vehicles; and overseas unaccompanied air baggage transportation, subject to the provisions of the Federal Property Management Regulations, title 41, Code of Federal Regulations, Subpart 101-41, and amendments thereto. This prepayment audit will be conducted by a General Services Administration's (GSA's) contractor, at the contractor's site, for the Relocation Management Office, FBI Headquarters in Washington, DC.

The Attorney General may redelegate this authority to any officer, official, or employee of the Federal Bureau of Investigation.

The Attorney General shall notify GSA in writing of these additional delegations and their basis. This delegation is effective upon publication in the Federal Register.

Dated: November 13, 1992.

Richard G. Austin,

Administrator of General Services.

[FR Doc. 92-30948 Filed 12-21-92; 8:45 am]

BILLING CODE 6820-24-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Injury Research Grant Review Committee: Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: Injury Research Grant Review Committee (IRGRC).

Times and Dates: 7 p.m.-9:30 p.m., January 10, 1993, 8 a.m.-6 p.m., January 11, 1993, 8 a.m.-12 noon, January 12, 1993

Place: Swissotel Atlanta, 3391 Peachtree Road, NE., Atlanta, Georgia 30326.

Status: Open 7 p.m.-9 p.m., January 10, 1993, Closed 8 a.m., January 11, 1993, through 12 noon, January 12, 1993

Purpose: This committee is charged with advising the Secretary of Health and Human Services, the Assistant Secretary for Health, and the Director, CDC, regarding the scientific merit and technical feasibility of grant applications relating to the support of injury control research and demonstration projects and injury prevention research centers.

Matters To Be Discussed: Agenda items for the meeting will include announcements, discussion of review procedures, future meeting dates, and review of grant applications. Beginning at 8 a.m., January 11, through 12 noon, January 12, the committee will conduct its review of grant applications. This portion of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c) (4) and (6), title 5 U.S.C., and the Determination of the Director, CDC, pursuant to Public Law 92-463.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Richard W. Sattin, M.D., Executive Secretary, IRGRC, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway, NE, Mailstop K58, Atlanta, Georgia 30341-3724, telephone 404/488-4265.

Dated: December 15, 1992.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 92-30957 Filed 12-21-92; 8:45 am]

BILLING CODE 4160-16-M

Health Care Financing Administration

Privacy Act of 1974; Report of New System

AGENCY: Department of Health and Human Services (HHS), Health Care Financing Administration (HCFA).

ACTION: Notice of new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended (codified at 5 U.S.C. 552a), we are proposing to establish a new system of records, "The Medicaid Necessity, Appropriateness, and Outcomes of Care Study," HHS/HCFA/ORD No. 09-70-0059. We have provided background information about the proposed system in the "Supplementary Information" section below. Although the Privacy Act requires only that the "routine uses" portion of the systems be published for comment, HCFA invites comments on all portions of this notice. See "Dates" section for comment period.

DATES: HCFA filed a new system of records report with the Chairman of the Committee on Government Operations of the House of Representatives, the Chairman of the Committee on Governmental Affairs of the Senate, and the Acting Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, on December 18, 1992. The new system of records will become effective 60 days subsequent to the date of publication in the Federal Register (February 22, 1993), unless HCFA receives comments which would necessitate alterations to the system.

ADDRESSES: The public should address comments to Richard A. DeMeo, Privacy Act Officer, Office of Budget and Administration, Health Care Financing Administration, room 2-H-4, East Low Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187. Comments received will be available for inspection at this location.

FOR FURTHER INFORMATION CONTACT: Ms. Penelope Pine, Office of Research, Office of Research and Demonstrations, Health Care Financing Administration, room 2502, Oak Meadows Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187, Telephone (410) 966-7718.

SUPPLEMENTARY INFORMATION: HCFA proposes to initiate a new system of records collecting data under the authority of section 9432(c) of Public Law 99-509, the Omnibus Budget Reconciliation Act of 1986. The purpose of this system of records is to provide data required to evaluate differences in

the necessity, appropriateness, and outcomes of care provided to Medicaid and privately insured patients. This study will assess the nature and outcomes of care provided to these two subpopulations through an extensive examination of detailed clinical data. The study will be conducted using data obtained from 250 hospitals located in three States: California, Georgia, and Michigan. The system will furnish information necessary to determine differences in the nature and outcomes of care provided to Medicaid and privately insured patients who receive treatment for the following conditions: Hysterectomy, complicated delivery, and pediatric asthma.

A pilot test of the data abstraction instrument is scheduled to begin in winter 1992, and the full study to commence in spring 1992. The system of records is expected to include data collected from hospital discharge abstracts, medical records, business office records, and emergency room logs and records. Information will be collected on approximately 16,340 individuals. This information will be collected and assessed by the study's contractor. In order to fulfill the objectives and complete the tasks of this contract, the contractor must have individually identifiable records. Because this system of records will be established and used strictly in accordance with the requirements and principles of the Privacy Act, it will not have an unfavorable effect on the privacy or other personal rights of individuals.

The Privacy Act permits us to disclose information without the consent of the individual for "routine uses"—that is, disclosure for purposes that are compatible with the purposes for which we collected the information. The proposed routine uses in the new system meet the compatibility criteria since the information is collected for the purpose of administering the Medicaid program for which HCFA is responsible. The disclosures under the routine uses will not result in any unwarranted adverse effects on personal privacy.

Dated: December 14, 1992.

William Toby, Jr.,

Acting Deputy Administrator, Health Care Financing Administration.

09-70-0059

SYSTEM NAME:

The Medicaid Necessity, Appropriateness, and Outcomes of Care Study.

SECURITY CLASSIFICATION:

None

SYSTEM LOCATION:

Data will be maintained at the contractor site and at HCFA. Contact system manager for location of contractor. See "System Manager(s) and Address" for system manager location.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Medicaid enrollees and privately insured individuals who receive hospital services at 250 hospitals in the three States (California, Georgia, and Michigan) chosen to participate in the study.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system will contain information concerning a patient's name, medical record number, demographic characteristics (e.g., age, sex), medical diagnoses and conditions, receipt of services, treatment protocols, outcomes of care, and other characteristics associated with the medical care rendered.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

This proposed system of records is authorized by section 9432(c) of Public Law 99-509, the Omnibus Budget Reconciliation Act of 1986.

PURPOSE OF THE SYSTEM:

To provide data necessary to evaluate differences in the nature and outcomes of care received by Medicaid and privately insured patients for selected conditions and treatments.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure may be made:

1. To contractor(s), for the purposes of collating, analyzing, aggregating, or otherwise refining or processing records in the system or for developing, modifying, and/or manipulating automatic data processing (ADP) software. Data may also be disclosed to contractors incidental to consultation, programming, operation, user assistance, or maintenance of ADP or telecommunication system containing or supporting records in the system. The contractor shall be required to maintain Privacy Act safeguards with respect to such records.

2. To a congressional office, from the record of an individual, in response to an inquiry from the congressional office made at the request of that individual.

3. To the Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

- (a) HHS, or any component thereof; or
- (b) Any HHS employee in his or her official capacity; or
- (c) Any HHS employee in his or her individual capacity where the

Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof (when HHS determines that the litigation is likely to affect HHS or any of its components); is a party to litigation or has an interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that each disclosure is compatible with the purpose for which the records were collected.

4. To an individual or organization for a research, demonstration, evaluation, or epidemiologic project related to the prevention of disease or disability or the restoration or maintenance of health if HCFA:

a. Determines that the use of disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

b. Determines that the research purpose for which the disclosure is to be made:

(1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form, and

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and

(3) There is reasonable probability that the objective for the use would be accomplished.

c. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and

(3) Makes no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual,

(b) For use in another research project, under these same conditions, and with the written authorization of HCFA,

(c) For disclosure to a properly identified person for the purpose of an

audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law;

d. Secures a written statement attesting to the recipient's understanding of a willingness to abide by these provisions.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper and electronic media.

RETRIEVABILITY:

Information will be retrieved by person's name and medical record number, or Social Security number.

SAFEGUARDS:

The contractor will maintain all records in secure storage areas accessible only to authorized employees and will notify all employees having access to records of criminal sanctions for unauthorized disclosure of information on individuals. For computerized records, the contractor will initiate ADP system security procedures required by HHS *Information Resources Manual Circular #10, Automated Information Systems Security Program* (e.g., use of passwords) (REF: HCFA Automated Information Systems Guide, HCFA.g:0805.1, "Systems Security Policies") and the National Institute of Standards and Technology Federal Information Processing Standards. Similar safeguards will be provided if any records are transferred to HCFA central office.

RETENTION AND DISPOSAL:

Hard copy data collection forms and magnetic tapes (or equivalent media) with identifiers will be retained in secure storage areas. Records will be retained for as long as needed for program research. Records will be disposed of 5 years after research is completed. The disposal techniques of degaussing will be used to strip magnetic tape (or equivalent media) of identifying names and numbers.

SYSTEM MANAGER AND ADDRESS:

The responsible agency official (System Manager) is the Director, Office of Research and Demonstrations, Health Care Financing Administration, 2230 Oak Meadows Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187.

NOTIFICATION PROCEDURE:

Notification of a record to be maintained in this system of records is governed by Department regulations at 45 CFR 5b.5 and 5b.6.

The request for notification must either be notarized or must contain a statement certifying that the requestor is who he claims to be, and that he understands that the knowing and willful request for or acquisition of a record under false pretenses is a criminal offense subject to a \$5,000 fine. Also, the request must further verify the requestor's identity with information which parallels the record to which notification is being sought. Such further verification may include such particulars as the individual's years of attendance at a particular educational institution, rank attained in the uniformed services, date or place of birth, names of parents, an occupation, or the specific times an individual received medical treatment.

Only a parent or guardian of a minor, or the legal guardian of an individual declared incompetent by a court, is authorized to request access to a record on behalf of the minor or the incompetent individual, respectively. The requestor, in addition to verifying his own identity, must verify his relationship to the minor or incompetent individual by providing a copy of the minor's birth certificate, a court order, or other competent evidence of guardianship.

The requestor must identify the name and address of a designated representative who may be a physician, other health professional, or other responsible individual who would be willing to review the record and inform the subject individual of its contents at the representative's discretion.

RECORD ACCESS PROCEDURE:

To obtain access to a record follow the instruction for procedure. Requestors should reasonably specify the record contents being sought.

The request for access must either be notarized or must contain a statement certifying that the requestor is who he claims to be, and that he understands that the knowing and willful request for or acquisition of a record under false pretenses is a criminal offense subject to a \$5,000 fine. Also, the request must further verify the requestor's identity with information which parallels the record to which access is being sought. Such further verification may include such particulars as the individual's years of attendance at a particular educational institution, rank attained in the uniformed services, date or place of birth, names of parents, an occupation,

or the specific times an individual received medical treatment.

Only a parent or guardian of a minor or the legal guardian of an individual declared incompetent by a court, is authorized to request access to a record on behalf of the minor or the incompetent individual by providing a copy of the minor's birth certificate, a court order, or competent evidence of guardianship.

The requestor must identify the name and address of a designated representative who may be a physician, other health professional, or other responsible individual who would be willing to review the record and inform the subject individual of its contents at the representative's discretion. To determine if a record exists, write to the System Manager at the address indicated above, specifying the name, address, and health insurance number or Social Security number.

CONTESTING RECORD PROCEDURE:

Contact the system manager named above and reasonably identify the record and specify the information to be contested. State the reason for contesting it (e.g., why it is inaccurate, irrelevant, incomplete, or not current). These procedures are in accordance with Department regulation 45 CFR 5b.7.

RECORD SOURCE CATEGORIES:

Sources of information contained in this records system are expected to include: hospital discharge abstracts, medical records, hospital business office data on source of payment, and hospital emergency room logs and records.

SYSTEMS EXEMPT FROM CERTAIN PROVISIONS OF THE PRIVACY ACT:

None.

[FR Doc. 92-30961 Filed 12-21-92; 8:45 am]
BILLING CODE 4120-03-M

Privacy Act of 1974; Systems of Records

AGENCY: Department of Health and Human Services (HHS), Health Care Financing Administration (HCFA).

ACTION: Notice of proposed new routine use for existing system of records.

SUMMARY: HCFA is proposing to revise the system notice for the "Group Health Plan (GHP) System," System No. 09-70-4001, by adding a new routine use for release of GHP data to State Medicaid agencies. The purpose of this new routine use is to allow State Medicaid agencies to determine which of their Medicaid recipients are dual eligible Medicare beneficiaries who are enrolled

in Medicare prepaid health plans, in order to coordinate the delivery of medical care and to determine proper payment responsibilities. A dual eligible beneficiary is a Medicare beneficiary who is either also eligible for Medicaid benefits or eligible for State payment of Medicare cost sharing expenses. Release of these data to the States would also help the States avoid making duplicate payments of claims paid by Medicare.

EFFECTIVE DATE: The proposed new routine use shall take effect without further notice 30 days from the date of publication (January 21, 1993) unless comments received on or before that date would warrant changes.

ADDRESSES: Please address comments to Mr. Richard A. DeMeo, HCFA Privacy Officer, Office of Budget and Administration, Health Care Financing Administration, Room 2-H-4 East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187. We will make comments received available for inspection at this location.

FOR FURTHER INFORMATION CONTACT: Mrs. Marla K. Kilbourne, Office of Prepaid Health Care Operations and Oversight, Division of Payment and Operations Support, Enrollment Operations Branch, Health Care Financing Administration, Room 1-G-2, Oak Meadows Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187. Her number is (410) 966-7622.

SUPPLEMENTARY INFORMATION: The GHP System, No. 09-70-4001, contains a master file of group health plan Medicare members used to expedite the exchange of data with group health plans, and to control the posting of pro rata amounts to the Part B deductible of currently enrolled GHP members. This system was last published in the *Federal Register* (52 FR 13525) on April 23, 1987. Currently, disclosure of the information in this system may be made to six different types of individuals and/or organizations for a variety of reasons, the majority of which relate to the timely and accurate processing of Medicare claims, the accurate and timely enrollment and disenrollment of Medicare GHP members, and for research purposes.

There are numerous safeguards, as described in the safeguard section of the notice, in place to protect the data which have been developed in accordance with part 6 of the HHS Information Resource Management Manual and the National Institute of Standards and Technology Information Process Standards.

We are proposing to add a new routine use for release of data to State Medicaid agencies to coordinate in the

delivery of medical care and to determine proper payment. The new routine use number (7) will read as follows:

(7) To a Medicaid State agency to coordinate the delivery of medical care and to determine proper payment responsibilities when certain conditions, as provided below, are met:

(a) HCFA receives in writing a request for a copy of the monthly GHP System from the Director of the State Medicaid agency on the agency's letterhead. The request must state that the data are needed to identify dual eligible Medicaid/Medicare HMO members for coordination of medical care and payments.

(b) The request must state that the confidentiality of the data will be maintained and that the data will be used only for the stated purposes.

(c) The agency must establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of any of the data on the GPH System file.

We are proposing that the States' Medicaid agencies have access to these data for several reasons. Many States are now expanding the number of enrollees in Medicaid managed care programs, and are developing statewide programs covering all Medicaid recipients. As these programs grow, it is essential that the managers of Medicaid programs know who is enrolled in Medicare HMOs. When the State does not know this, dual eligibles can be enrolled in both a Medicare HMO and a Medicaid HMO. Recipients then have two sets of providers, two cards, and two sets of rules and procedures to deal with. Consequently, plans are often providing and receiving payment for duplicative care. Because the main function of managed care is to effectively coordinate care, sharing data between Medicare and Medicaid is essential. Beneficiaries can be eligible both for Medicare and Medicaid HMOs. Providers in both Medicare and Medicaid may not be aware of a recipients dual eligibility. It would be a tremendous benefit to beneficiaries if this basic communication between Medicare and Medicaid was improved. It would also help reduce the billing confusion and cost for Medicaid providers. Finally, the Government has an interest in avoiding the wasteful practice of paying twice, through a Medicare capitation payment and through Medicaid capitation or fee-for-service payments, for the same services.

The provision of Medicare HMO enrollment data, as contained in the GHP System, will provide this link between both programs, thereby

facilitating the coordination of the delivery of care to beneficiaries and avoiding duplicate payments.

The proposed new routine use for the GHP System is consistent with the Privacy Act, 5 U.S.C. 552(a)(7), since it is compatible with the purpose for which the information is collected. Because this addition of a routine use will not change the purposes for which the information is to be used or otherwise alter the system, we are not required to prepare a report of altered system of records under 5 U.S.C. 552a(r). In addition, we are publishing the notice in its entirety below for the convenience of the reader.

Dated: December 14, 1992.

William Toby, Jr.,
Acting Deputy Administrator, Health Care Financing Administration.

09-70-4001

SYSTEM NAME:

Group Health Plan System HHS/HCFA/OPHCOO.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Health Care Financing Administration, Bureau of Data Management and Strategy, Division of Capitation Systems, 6325 Security Boulevard, Baltimore, Maryland 21207-5187

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Recipients of Part A (Hospital Insurance) and Part B (supplementary medical) Medicare services enrolled in a group health plan.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system contains information about a beneficiary's health insurance entitlement and supplementary medical benefits usage. Contact System Manager for location of Contractor(s).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 1833(a)(1)(A), 1866 and 1876 of Title XVIII of the Social Security Act (42 U.S.C. 1395(a)(1)(A), 1395cc, and 1395mm).

PURPOSE(S):

To maintain a master file of Group Health Plan members for accounting control; to expedite the exchange of data with the Group Health Plans; and to control the posting of pro-rata amounts to the Part B deductible of currently enrolled Group Health Plan members.

Group Health Plan include the following: Health Maintenance

Organizations (HMO), Competitive Medical Plans (CMP), and Health Care Prepayment Plans (HCPP).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure may be made: (1) To a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual. (2) To the Department of Justice, to a court or other tribunal, or to another party before such tribunal, when (a) HHS, or any component thereof; or (b) Any HHS employee in his or her official capacity; or (c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or (d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components, is a party to litigation or has an interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case; HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(3) To an individual or organizations for a research evaluation, or epidemiologic project related to the prevention of disease or disability, or the restoration or maintenance of health if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

b. Determines that the purpose; for which the disclosure is to be made:

(1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form.

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and

(3) There is reasonable probability that the objective for the use would be accomplished;

c. Requires the information recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) Remove or destroy the information that allows the individual to be

identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual.

(b) For use in another research project, under these same conditions, and with written authorization of HCFA.

(c) For disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit or

(d) When required by law; d. Secures a written statement attesting to the information recipient's understanding of a willingness to abide by the provisions.

(4) To providers and suppliers of services directly or dealing through contractors, fiscal intermediaries or carriers for administration of Title XVIII. Providers and suppliers:

a. Will have access only through a CRT terminal.

b. Will have access to only one record at a time.

c. Must enter both beneficiary name and Health Insurance Claim Number to access a record.

d. Must have a claim for services for the beneficiary.

e. Must enter a password in order to get access to the file.

5. To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Data would also be disclosed to contractors incidental to consultation, programming, operation, user assistance, or maintenance for ADP or telecommunications system containing or supporting records in the system.

6. To a contractor when the Department contracts with a private firm for the purpose of collating, analyzing, aggregating, or otherwise refining records in this system. Relevant records will be disclosed to such a contractor. The contractor shall be required to maintain Privacy Act safeguards with respect to such records. The contractor must agree:

a. Not to publish or otherwise disclose data in a form in which beneficiaries

could be identified (except to plans, providers, suppliers, carriers, and intermediaries as authorized by HCFA), and,

b. To safeguard the confidentiality of the data and to prevent unauthorized access to it.

(7) To a Medicaid State Agency to coordinate the delivery of medical care and to determine proper payment responsibilities when certain conditions, as provided below, are met before the release of data.

(a) HCFA receives in writing a request for a copy of the monthly Group Health Plan System from the Director of the state Medicaid agency on the agency's letterhead. The request must state that the data is needed to identify dual eligible Medicaid/Medicare HMO members for coordination of medical care and payments.

(b) The request must state that the confidentiality of the data will be maintained and that the data will be used only for the stated purposes. (c) The agency must establish reasonable administrative, technical and physical safeguards to prevent unauthorized use or disclosure of any of the data on the Group Health Plan System file.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Magnetic tape and microfilm.

RETRIEVABILITY:

The system is indexed by health insurance claim number.

SAFEGUARDS:

Only authorized personnel have direct access to information in the Group Health Plan systems. In addition, Groups Health Plan personnel are advised that information is confidential.

Offices containing records are locked when not in use. Computer terminals are in secured areas. All buildings are locked at night.

Employees who maintain records in this system are instructed to grant access only to authorized users. Data stored in computers are accessed through the use of passwords/keywords/numbers known only to the authorized personnel. These passwords are changed as needed. Contractor(s) who maintain records in this system are instructed to make no further disclosures of the records except as authorized by the system manager in accordance with the Privacy Act. Privacy Act requirements are specifically included in contracts related to this system. The project officer and contract officer oversee compliance with these requirements.

The particular safeguards implemented are developed in accordance with Part 6, "ADP Systems Security," of the HHS ADP Systems Manual and the National Bureau of Standards Federal Information Process Standards.

RETENTION AND DISPOSAL:

Health insurance materials used to support the accuracy of the charge per service billed by the plan are retained for 3 years, then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Health Care Financing Administration, Director, Office of Prepaid Health Care Operations and Oversight, 6325 Security Boulevard, Baltimore, Maryland 21207-5187

NOTIFICATION PROCEDURE:

Inquiries and requests for system records should be addressed to the system manager named above and directed to the attention of the Office of Financial Management. The individuals should furnish his or her health insurance claim number as shown on social security records.

RECORD ACCESS PROCEDURES:

Same as notification procedures. Requesters should also reasonably specify the record contents being sought. (These access procedures are in accordance with Department Regulations (45 CFR 5b.5(a)(2).))

CONTESTING RECORD PROCEDURES:

Contact the official at the address specified under notification procedures above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department Regulations (45 CFR 5b.7).)

RECORD SOURCE CATEGORIES:

The identifying information contained in these records is obtained from the group health plans (which obtained the data from the individual concerned, and the Health Insurance Master record.)

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 30960 Filed 12-21-92; 8:45 a.m.]

BILLING CODE 4120-3-M

Health Resources and Services Administration

Filing of Annual Report of Federal Advisory Committee

Notice is hereby given that pursuant to section 13 of Public Law 92-463, the Annual Report for the following Health Resources and Service Administration's Federal Advisory Committee has been filed with the Library of Congress:

National Advisory Council on Migrant Health

Copies are available to the public for inspection at the Library of Congress Newspaper and Current Periodical Reading Room, Room 1026, Thomas Jefferson Building, Second Street and Independence Avenue, SE., Washington, DC. Copies may be obtained from: Mr. Jack Egan, Executive Secretary, National Advisory Council on Migrant Health, room 7A-55, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443-1153.

Dated: December 16, 1992.

Jackie E. Baum,
Advisory Committee Management Officer,
HRSA.

[FR Doc. 92-30920 Filed 12-21-92; 8:45 am]

BILLING CODE 4160-15-M

DEPARTMENT OF THE INTERIOR

National Park Service

Revision of Park Boundary; Adams National Historic Site

Whereas, Section 5 of Public Law 95-42 (91 Stat. 210) amended the Land and Water Conservation Fund Act of 1965 to authorize the Secretary of the Interior to acquire, by donation, land adjacent to an area of the National Park System; and

Whereas, Section 303 of the Act of April 11, 1972 (86 Stat. 120) authorizes the acquisition of certain lands in Quincy, Massachusetts, for Adams National Historic Site; and

Whereas, The Commonwealth of Massachusetts has expressed its intention to donate an interest in the lands immediately adjacent to the Park;

Therefore, Pursuant to section 5 of Public Law 95-42, notice is given that the boundary of Adams National Historic Site has been revised to include an additional 3.92 acres identified as Tract 01-104 on Land Status Map 01. Drawing No. 386/92,001, dated February 1992.

The map is on file and available for inspection in the office of the Land Resources Division Mid-Atlantic

Region, National Park Service, 143 South Third Street, Philadelphia, Pennsylvania 19106 and in the office of the National Park Service, Department of the Interior, 18th and C Streets NW., Washington, DC 20240.

Dated: August 20, 1992.

Marie Rust,

Regional Director, North Atlantic Region.

[FR Doc. 92-30984 Filed 12-21-92; 8:45 am]

BILLING CODE 4810-70-M

Big Thicket National Preserve; Revision of Preserve Boundary at Little Pine Island—Pine Island Bayou Corridor Unit

Section 1 of the Act of October 11, 1974 (88 Stat. 1254), provides for the establishment of Big Thicket National Preserve and authorizes the United States to accept title to any lands, or interests in lands, located outside the boundaries of the preserve which any private person, organization, or public or private corporation may offer to donate to the United States, if the Secretary finds that such lands would make a significant contribution to the purposes for which the preserve was created and he may administer such lands as part of the preserve. The specific lands proposed for addition are described as follows:

All those certain tracts or parcels of land situated in the Daniel Easley Survey, A-20, and the Wesley Dikes Survey, A-17, Jefferson County, Texas, said tracts or parcels being more particularly described as follows:

Tract No. 176-22

All that certain tract or parcel of land lying and situate in the County of Jefferson, Texas, being 20.44 acres more or less, out of the Daniel Easley Survey, A-20, and being more particularly described as follows:

Beginning at the most easterly corner of the lands of grantor, said corner being South 80° 25' 41" West 3596.67 feet, more or less, from the northeast corner of the Daniel Easley Survey, A-20, said Point of Beginning having Texas Central Zone Grid Co-ordinates of North 241,389.39 and East 3,936,298.69;

Thence with the lands of grantor and the northwest right-of-way line of Loop Road and with the Boundary Line of Big Thicket National Preserve South 28° 41' 29" West 567.86 feet, more or less;

Thence with the dividing line between the lands of grantor and the lands, now or formerly, or O.B. Land and continuing with said Boundary Line North 60° 58' 21" West 1435.50 feet, more or less, to a Government marker;

Thence crossing the lands of grantor as follows: North 07° 02' 11" East 612.97 feet, more or less, to a Government marker; North 57° 19' 33" East 28.62 feet, more or less, to a Government marker; and North 57° 28' 55" East 38.98 feet, more or less;

Thence leaving said line and with the dividing line between the lands of grantor and the lands, now or formerly, of E. S. Westmoreland and with the Boundary Line of Big Thicket National Preserve South 60° 58' 21" East 165.00 feet, more or less, to the northwest right-of-way line of Stonetown Road;

Thence with the right-of-way line of said Stonetown Road and continuing with said Boundary Line as follows: South 29° 09' 39" West 60.00 feet, more or less; and South 60° 58' 21" East 1464.70 feet, more or less, to the Point of Beginning. Containing 20.44 acres of land, more or less.

Tract No. 176-23

All that certain tract or parcel of land lying and situate in the County of Jefferson, Texas, being 8.25 acres, more or less, out of the Wesley Dikes Survey, A-17, and the Daniel Easley Survey, A-20, and being more particularly described as follows:

Beginning at a north corner of the lands of grantor, also being the intersection of a southeast right-of-way line of Best Road with the southwest line of the lands, now or formerly, of Annie L. Sheffield, said corner being South 07° 48' 03" East 657.44 feet, more or less, from the northwest corner of the Wesley Dikes Survey, A-17, and the northeast corner of the Daniel Easley Survey, A-20, said Point of Beginning having Texas Central Zone Grid Coordinates of North 241,336.12 and East 3,939,934.52;

Thence with the dividing line between the lands of grantor and the lands of said Annie L. Sheffield and with the Boundary Line of Big Thicket National Preserve as follows: South 60° 31' 10" East 130.00 feet, more or less; and North 61° 05' 26" East 363.39 feet, more or less, to a Government marker;

Thence leaving said Boundary Line and crossing the lands of grantor as follows: South 11° 38' 03" and West 957.31 feet, more or less, to a Government marker; and South 72° 58' 55" West 250.72 feet, more or less, in the northeast right-of-way line of Best Road;

Thence with right-of-way line of said Best Road and with said Boundary Line as follows: North 17° 00' 22" West 608.31 feet, more or less, and North 29° 27' 52" East 364.80 feet, more or less, to the Point of Beginning.

Containing 8.25 acres of land, more or less.

Tract No. 176-24

All that certain tract or parcel of land lying and situate in the County of Jefferson, Texas, being 4.32 acres, more or less, out of the Wesley Dikes Survey, A-17, and the Daniel Easley Survey, A-20, and being more particularly described as follows:

Beginning at the most southerly south corner of the lands of grantor in the northeast right-of-way line of Stonetown Road, said corner being South 01° 43' 19" East 2570.97 feet, more or less, from the northeast corner of the Wesley Dikes Survey, A-17, and the northeast corner of the Daniel Easley Survey, A-20, said Point of Beginning having Texas Central Zone Grid Coordinates of North 239,417.66 and East 3,939,922.54.

Thence with the right-of-way line of said Stonetown Road and with the Boundary Line of the Big Thicket National Preserve North 60° 31' 10" West 274.62 feet, more or less;

Thence with the southeast right-of-way line of Best Road and continuing with said Boundary Line North 29° 27' 52" East 685.70 feet, more or less, to a Government marker;

Thence crossing the lands of grantor South 60° 31' 10" East 274.62 feet, more or less, to a Government marker in the Southeast line of the lands of grantor; Thence with said southeast line and with said Boundary Line South 29° 27' 52" West 685.70 feet, more or less, to the Point of Beginning.

Containing 4.32 acres of land, more or less.

Tract No. 176-25

All that certain tract or parcel of land lying and situate in the County of Jefferson, Texas, being 14.51 acres, more or less, out of the Wesley Dikes Survey, A-17, and the Daniel Easley Survey, A-20, and being more particularly described as follows:

Beginning at the most southerly west corner of the lands of grantor, also being the south corner of Block 27 of the Beaumont Irrigating Company's Subdivision, said corner being South 12° 36' 00" West 2298.08 feet, more or less, from the northwest corner of the Wesley Dikes Survey, A-17, and the northeast corner of the Daniel Easley Survey, A-20, said Point of Beginning having Texas Central Zone Grid Co-ordinates of North 239,744.74 and East 3,939,343.97;

Thence with the dividing line between the lands of grantor and the lands the Beaumont Irrigating Company's Subdivision and with the Boundary Line of the Big Thicket National Preserve as follows: North 29° 27' 52" East 660.00 feet, more or less; North 60° 31' 10" West 660.00 feet, more or less; and North 29° 27' 52" East 630.00 feet, more or less, to a point in the southwest right-of-way line of Best Road;

Thence leaving said dividing line and with the right-of-way line of said road and continuing with said Boundary Line as follows: South 60° 12' 25" East 328.50 feet, more or less; South 17° 00' 22" East 912.40 feet, more or less; and South 29° 27' 52" West 660.00 feet, more or less; and

Thence leaving said right-of-way line and with the northeast right-of-way line of Stonetown Road and continuing with said Boundary Line North 60° 31' 10" West 330.00 feet, more or less, to the Point of Beginning.

Containing 14.51 acres of land, more or less.

All bearings are based on Grid North.

Notice is hereby given that in accordance with the Act of October 11, 1974, the boundary of the Little Pine Island—Pine Island Bayou Corridor Unit of Big Thicket National Preserve is revised as described above, and as shown on Big Thicket National Preserve land acquisition status map, segment 176. This map is on file and available for inspection in the Office of the National Park Service, Department of the Interior; the Office of the Southwest Region, National Park Service; and the Office of the Superintendent, Big Thicket National Preserve.

Dated: December 8, 1992.

John E. Cook,

Regional Director, Southwest Region.

[FR Doc. 92-30985 Filed 12-21-92; 8:45 am]

BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 12, 1992. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by

[15 days after publication date]

Carol D. Shull,

Chief of Registration, National Register.

CALIFORNIA

Mendocino County

Willits Carnegie Library (California Carnegie Libraries), 85 E. Commercial St., Willits, 92001756

Sacramento County

Eastern Star Hall, 2719 K St., Sacramento, 92001757

San Benito County

Monterey Street Historic District, Monterey St. and intersecting streets between 5th and B Sts., Hollister, 92001740

San Diego County

Bandy House, 638 S. Juniper, Escondido, 92001754

Hotel Charlotte, 637 S. Upas, Escondido, 92001752

Santa Barbara County

Campbell No. 2 Archeological Site, Address Restricted, Goleta vicinity, 92001755

Stanislaus County

Turlock Carnegie Library (California Carnegie Libraries), 250 N. Broadway, Turlock, 92001753

FLORIDA

Indian River County

Vero Beach Community Building, Old, 2146 14th Ave., Vero Beach, 92001746

Lake County

Clermont Woman's Club, 655 Broome St., Clermont, 92001747

Wakulla County

Wakulla Springs Archeological and Historic District, 1 Spring Dr., Wakulla Springs vicinity, 92001760

HAWAII**Hawaii County**

*Volcano Block Building, 27-37 Wianuenu
Ave., Hilo, 92001748*

IOWA**Muscatine County**

*Wilton Candy Kitchen, 310 Cedar St., Hilton,
92001742*

Sioux County

*Fleshman, Charles M. and Emma M. Fischer,
House, 919 9th St., Hawarden, 92001743*

Wright County

*Burlington, Cedar Rapids & Northern Passenger
Depot—Dows (Advent & Development of
Railroads in Iowa MPS), 200 Railroad St.,
Dows, 92001744*

MISSOURI**Osage County**

*Bonnots Mill Historic District, Roughly Old
Mill Rd., Riverside Dr., Highwater Rd., Iris
Ave., Wildwood Ln., Hwy. A and Main,
Short and Church Hill Sts., Bonnots Mill,
92001738*

Phelps County

*Phelps County Courthouse, Jct. of Third and
Main Sts., Rolla, 92001745*

Shannon County

*Round Spring Archeological District, Address
Restricted, Eminence vicinity, 92001749
Two Rivers Site, Address Restricted,
Eminence vicinity, 92001750*

SOUTH CAROLINA**Greenville County**

*West End Commercial Historic District,
Roughly, jct. of Pendleton, River, Augusta
and S. Main Sts. and E along Main to
Camperdown Way, Greenville, 92001751*

TENNESSEE**Fentress County**

*Davidson School (Fentress County MPS), TN
85, Davidson, 92001739*

Williamson County

*Maplewood Farm (Williamson County MPS),
3085 Duplex—Spring Hill Rd., Spring Hill
vicinity, 92001758*

TEXAS**El Paso County**

*Mission Socorro Archeological Site, Address
Restricted, Socorro, 92001741*

Harris County

*House at 943½ Cortlandt Street (Houston
Heights MRA), 943½ Cortlandt St.,
Houston, 84003972*

Nacogdoches County

*Zion Hill Historic District (Nacogdoches
MPS), Roughly bounded by Park St.,
Lanana Cr., Oak Grove Cemetery and N.
Lanana St., Nacogdoche, 92001759*

(FR Doc. 92-30915 Filed 12-21-92; 8:45 am)

BILLING CODE 4310-70-M

**INTERNATIONAL TRADE
COMMISSION**

[Investigation No. 731-TA-564 (Final)]

**Certain Stainless Steel Butt-Weld Pipe
Fittings From Taiwan; Institution and
Scheduling of a Final Antidumping
Investigation**

AGENCY: United States International
Trade Commission.

ACTION: Institution and scheduling of a
final antidumping investigation.

SUMMARY: The Commission hereby gives notice of the institution of final antidumping investigation No. 731-TA-564 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Taiwan of certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter, provided for in subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States.

For further information concerning the conduct of this investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: December 17, 1992.

FOR FURTHER INFORMATION CONTACT: Brian Walters (202-205-3198), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

SUPPLEMENTARY INFORMATION:**Background**

This investigation is being instituted as a result of an affirmative preliminary determination by the Department of Commerce that imports of certain stainless steel butt-weld pipe fittings from Taiwan are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. § 1673b). The investigation was requested in a petition filed on May 20, 1992, by Flowline

Division, Markovitz Enterprises, Inc.,
New Castle, PA.

**Participation in the Investigation and
Public Service List**

Persons wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission not later than seven (7) days after publication of this notice in the *Federal Register*. Section 201.11 of the Commission's rules is hereby waived. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

**Limited Disclosure of Business
Proprietary Information (BPI) Under an
Administrative Protective Order (APO)
and BPI Service List**

The Secretary will make BPI gathered in this final investigation available to authorized applicants under the APO issued in the investigation, provided that the application is made not later than seven (7) days after the publication of this notice in the *Federal Register*. Section 207.7(a) of the Commission's rules is hereby waived. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in this investigation will be placed in the nonpublic record on December 31, 1992, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with this investigation beginning at 9:30 a.m. on January 14, 1993, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 5, 1993. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on January 8, 1993, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), and 207.23(b) of the Commission's rules. Parties are strongly encouraged to submit as early in the

investigation as possible any requests to present a portion of their hearing testimony *in camera*.

Written Submissions

Each party is encouraged to submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.22 of the Commission's rules; the deadline for filing is January 8, 1993. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.23(b) of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.24 of the Commission's rules. The deadline for filing posthearing briefs is January 22, 1993; witness testimony must be filed no later than three (3) days before the hearing. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before January 22, 1993. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules.

By order of the Commission.

Issued: December 18, 1992.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 92-31211 Filed 12-21-92; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32203]

ISS Rail, Inc.—Operation Exemption—Lawrence County, PA; Notice of Exemption

ISS Rail, Inc. (ISS), a noncarrier, has filed a notice of exemption to operate 1.9 miles of rail line located in the City

of New Castle and the Township of Union, Lawrence County, PA. This line was abandoned by Consolidated Rail Corporation (Conrail) and sold to the Penn Power Company (PPC) on June 5, 1985. Subsequently, PPC, on September 19, 1991, sold the right-of-way to ISS. ISS, after its purchase, reinstalled track and on March 1, 1992, began private contract service to the Ellwood Quality Steel Corp. of Ellwood City, PA. On August 6, 1992, ISS obtained a Certificate of Public Convenience from the Pennsylvania Public Utility Commission and began intrastate common carrier operations. ISS can interchange with both CSX Transportation, Inc. and Conrail over the involved rail line.

To participate in the origination and termination of freight moving in interstate commerce, ISS seeks an exemption from the requirement under 49 U.S.C. 10901 for authorization to provide interstate rail freight service as a common carrier. ISS will commence interstate rail service, to all shippers on the line requesting service, upon publication of the involved exemption.

ISS states that it does not own or operate any other rail lines and that its revenues will not exceed those of a class III rail carrier.

Any comments must be filed with the Commission and served on: Richard R. Wilson, Vuono, Lavelle & Gray, 2310 Grant Building, Pittsburgh, PA 15219.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: December 15, 1992.

By the Commission, David M. Konschnick, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-30983 Filed 12-21-92; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 32187]

Missouri & Northern Arkansas Railroad Company, Inc.—Lease Acquisition and Operation Exemption—Missouri Pacific Railroad Company and Burlington Northern Railroad Company; Notice of Exemption

Missouri & Northern Arkansas Railroad Company, Inc. (MNA), a noncarrier, has filed a notice of exemption: (1) To acquire by lease or purchase and to operate seven rail lines of Missouri Pacific Railroad Company

(MPRR) for a total distance of 491.27 miles in the States of Arkansas, Kansas and Missouri; and (2) to acquire incidental trackage rights over two rail lines of MPRR in the States of Arkansas and Missouri and two rail lines of Burlington Northern Railroad Company (BN) in the State of Missouri for a total distance of 60.33 miles. MNA will become a class III rail carrier. The transaction was to be consummated on or after December 13, 1992.¹

The seven rail lines involved in the acquisition by lease or purchase are described as follows:

(1) Lease from MP 643.13, near Pleasant Hill, MO, to MP 415.00, near Bergman, AR, a distance of 228.13 miles;

(2) Purchase from MP 415.00, near Bergman, AR, to MP 313.00, at Guion, AR, a distance of 102.00 miles;

(3) Lease from MP 313.00, at Guion, AR, to MP 259.05, at Diaz Jct., AR, a distance of 53.95 miles;

(4) Lease from MP 527.94, near Carthage, MO, to MP 544.66, near Joplin, MO, known as the Webb City Branch, a distance of 16.72 miles;

(5) Lease from MP 0.07, near Webb City, MO, to MP 6.43, near Atlas, MO, known as the Atlas Branch, a distance of 6.36 miles;

(6) Lease from MP 512.40, near Springfield, MO, to MP 506.59, near Wallis, MO, known as the Wallis Spur, a distance of 5.81 miles; and

(7) Lease from MP 340.50, near Griffith, KS, to MP 262.60, near North Clinton, MO, known as the Clinton Branch, a distance of 78.30 miles (which includes a 1.4-mile equation between MP 272.00 and MP 273.00).

The incidental trackage rights that MNA will acquire as part of the proposed transaction will be over the following lines:

(1) MPRR's line from MP 643.13, near Pleasant Hill, MO, to MP 276.80, at Neff Yard in Kansas City, MO, a distance of 27.83 miles;

(2) MPRR's line from MP 259.05, near Diaz Jct., AR, to MP 261.5, near Newport, AR, a distance of 2.45 miles;

(3) BN's line from MP 512.02 to MP 512.13 in Springfield, MO, a distance of .11 miles; and

(4) BN's line from Chaining Station 14187+07, near Aurora, MO, to Chaining Station 10637+09+2354 feet, near Springfield, MO, a distance of 29.94 miles.

MPRR currently has trackage rights over the BN lines and will assign its

¹ This proceeding is related Finance Docket No. 32188, wherein RailTex, Inc., the parent company of MNA has concurrently filed a notice of exemption for its continuance in control of MNA when MNA becomes a carrier upon consummation of the transaction described in this notice.

rights to MNA to operate over these BN lines.

All comments must be filed with the Commission and served on: Robert L. Calhoun, Sullivan & Worcester, suite 1000, 1025 Connecticut Avenue, NW., Washington, DC 20036.

This notice is filed under 49 CFR 1150.31. If the notice of exemption contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: December 15, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 30981 Filed 12-21-92; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 32188]

Railtex, Inc.—Continuance in Control Exemption—Missouri & Northern Arkansas Railroad Company, Inc.; Exemption

RailTex, Inc. (RailTex) has filed a notice of exemption to continue to control Missouri & Northern Arkansas Railroad Company, Inc. (MNA) upon MNA's becoming a carrier. MNA has concurrently filed a notice of exemption pursuant to 49 CFR 1150.31: (1) To acquire by lease or purchase and to operate 491.27 miles of rail line from Missouri Pacific Railroad Company (MPRR) in the States of Arkansas, Kansas and Missouri; and (2) to acquire 60.33 miles of incidental trackage rights over MPRR lines in the States of Arkansas and Missouri and of Burlington Northern Railroad Company in the State of Missouri.¹ MNA expected the transaction to be consummated on or after December 13, 1992.

RailTex also controls 10 other class III railroads operating in 13 states as follows: The Chesapeake and Albermarle Railroad Company, Inc.; the North Carolina & Virginia Railroad Company, Inc.; the Mid-Michigan Railroad Company, Inc.; The Austin Railroad Company, Inc. (d/b/a Austin & Northwestern Railroad); the South Carolina Central Railroad Company, Inc.; the Dallas, Garland & Northeastern Railroad Company, Inc.; the San Diego & Imperial Valley Railroad; the New

Orleans Lower Coast Railroad; the Michigan Shore Railroad, Inc.; and the Indiana Southern Railroad. RailTex states that: (1) None of these railroads connect with MNA; (2) the proposed transaction is not part of a series of anticipated transactions that would connect MNA with any railroad in the RailTex corporate family; and (3) no class I railroad is involved. The transaction therefore is exempt from the prior approval requirements of 49 U.S.C. 11343. See 49 CFR 1180.2(d)(2).

As a condition to the use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission and served on: Robert L. Calhoun, Sullivan & Worcester, suite 1000, 1025 Connecticut Avenue, NW., Washington, DC 20036.

Decided: December 15, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-30982 Filed 12-21-92; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub-No. 432X)]

CSX Transportation, Inc.—Abandonment Exemption—Wake County, NC

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission exempts from the prior approval requirements of 49 U.S.C. 10903, *et seq.*, the abandonment by CSX Transportation, Inc., of 5.55 miles of its Aberdeen Subdivision, Florence Division, in Wake County, NC, between mileposts SDS-20.65 at Apex and SDS-26.2 near Holly Springs, subject to environmental, public use, and standard labor protective conditions. In addition, a notice of interim trail use has been issued for the line.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on January 21, 1993. Formal expressions of intent to file an offer¹ of financial assistance

¹ See Exempt. of Rail Adandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

under 49 CFR 1152.27(c)(2) must be filed by January 4, 1993, petitions to stay must be filed by January 4, 1993, and petitions to reopen must be filed by January 11, 1993. Requests for a public use condition must be filed by January 11, 1993.

ADDRESSES: Send pleadings referring to Docket No. AB-55 (Sub-No 432X) to:

- (1) Office of the Secretary, Case Control Branch; Interstate Commerce Commission; Washington, DC 20423.
- (2) Petitioner's representative: Charles M. Rosenberger, CSX Transportation, Inc., 500 Water Street, Jacksonville, FL 32202.

FOR FURTHER INFORMATION CONTACT:

Richard B. Felder, (202) 927-5610, (TDD for hearing impaired: (202) 927-5712).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359.

[Assistance for the hearing impaired is available through TDD services (202) 927-5712.]

Decided: December 10, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons and Phillips.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-30979 Filed 12-21-92; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-380X]

Huron and Eastern Railway Company, Inc.; Abandonment Exemption—Sanilac County, MI

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: Pursuant to 49 U.S.C. 10505, the Commission exempts the Huron and Eastern Railway Company, Inc. (H&E), from the prior approval requirements of 49 U.S.C. 10903-10904 to permit H&E to abandon an approximately 4.6-mile line of railroad between milepost 2.33, west of Carsonville, MI, and milepost 6.9, at Sundusky, in Sanilac County, MI, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the condition that H&E obtain a permit under the Michigan land/water interface statutes prior to salvaging bridges or culverts on the right-of-way or spreading ballast.

¹ Finance Docket No. 32187, Missouri & Northern Arkansas Railroad Company, Inc.—Lease, Acquisition and Operation Exemption—Missouri Pacific Railroad Company and Burlington Northern Railroad Company.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on January 21, 1993. Formal expressions of intent to file an offer¹ of financial assistance under 49 CFR 1152.27(c)(2) must be filed by January 1, 1993. Petitions for stay must be filed by January 6, 1993. Requests for a public use condition in conformity with 49 CFR 1152.28(a)(2) must be filed by January 11, 1993. Petitions to reopen must be filed by January 19, 1993.

ADDRESSES: Send pleadings referring to Docket No. AB-380X to:

- (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.
- (2) Petitioners' representative: John D. Heffner, suite 1107, 1700 K Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT:

Richard B. Felder, (202) 927-5610, [TDD for hearing impaired: (202) 927-5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927-5721.]

Decided: December 14, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons and Phillips.

Sidney L. Strickland, Jr.,
Secretary.

[FR Doc. 92-30980 Filed 12-21-92; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-3; Sub-No. 105X]

**Missouri Pacific Railroad Company—
Abandonment Exemption—in Harris
County, TX**

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission exempts from the prior approval requirements of 49 U.S.C. 10903-10904 the abandonment by the Missouri Pacific Railroad Company of its 27.92-mile line of railroad between milepost 156.99, near Katy, and milepost 184.91 at North GH&H Junction, near Houston, in Harris County, TX, subject to standard labor protection conditions and certain other

conditions. The Commission also exempts this transaction from the offer of financial assistance procedures of 49 U.S.C. 10905.

DATES: These exemptions will be effective on December 22, 1992. Petitions to reopen must be filed by January 16, 1993.

ADDRESSES: Send pleadings referring to Docket No. AB-3 (Sub-No. 105X) to:

- (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423, and
- (2) Petitioner's representative: Linda D. Fienberg, 1201 Pennsylvania Avenue, NW., P.O. Box 7566, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT:

Richard B. Felder (202) 927-5610. [TDD for hearing impaired: (202) 927-5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927-5721.]

Decided: December 16, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, and Phillips.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-30994 Filed 12-21-92; 8:45 am]

BILLING CODE 7035-01-M

**NATIONAL FOUNDATION ON THE
ARTS AND THE HUMANITIES**

**Cooperative Agreements for Mayors'
Institute on City Design**

AGENCY: National Endowment for the Arts.

ACTION: Notification of availability.

SUMMARY: The National Endowment for the Arts is requesting proposals leading to the award of two separate Cooperative Agreements to assist in planning, organizing, and implementing two three-day conferences to sensitize and educate mayors to be better patrons and decision-makers in matters of urban design. One award will be to a school of architecture located in a southern state (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia), and one award will be to a school of architecture

located in a midwestern state (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin). Applicants must be a University with a graduate program school of architecture in urban design. Funding is limited to \$35,000 for each Institute. The initial period of the Cooperative Agreements will be one year with potential renewal for an additional two years.

Those interested in receiving the Solicitation package for the Midwestern Region Mayors' Institute should reference Program Solicitation PS 92-05 in their written request. Those interested in receiving the Solicitation package for the Southern Region Mayors' Institute should reference Program Solicitation PS 92-06 in their written request. Requests must be accompanied by two (2) self-addressed labels. Verbal requests for the Solicitations will not be honored.

DATES: Program Solicitations PS 92-05 and PS 92-06 are scheduled for release approximately January 7, 1993 with proposals due February 7, 1993.

ADDRESSES: Requests for the Solicitation should be addressed to the National Endowment for the Arts, Contracts Division, room 217, 1100 Pennsylvania Ave. NW., Washington, DC 20506.

William I. Hummel,

Director, Contracts and Procurement Division.

[FR Doc. 92-30959 Filed 12-21-92; 8:45 am]

BILLING CODE 7537-01-M

**Challenge/Advancement Advisory
Panel; Meeting**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Challenge/Advancement Advisory Panel (Music Advancement Section) to the National Council on the Arts will be held on January 27, 1993 from 9 a.m.-5:30 p.m. and January 28 from 9 a.m.-5 p.m. in room M-07 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Portions of this meeting will be open to the public on January 25 from 9 a.m.-10 a.m. and January 28 from 4 p.m.-5 p.m. for opening remarks and policy discussion.

The remaining portions of this meeting on January 27 from 10 a.m.-5:30 p.m. and January 28 from 9 a.m.-4 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the

¹ See Exempt. of Rail Line Abandonment—Offers of Finan. Assist., 4 L.C.C.2d 164 (1987).

Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of November 24, 1992, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, (202) 682-5532, TTY (202) 682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5439.

Dated: December 15, 1992.

Yvonne M. Sabine,
Director, Panel Operations, National Endowment for the Arts.

[FR Doc. 92-30954 Filed 12-21-92; 8:45 am]

BILLING CODE 7537-01-M

Humanities Panel; Meetings

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: David C. Fisher, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone 202/606-8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on 202/606-8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications

for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; or (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated September 9, 1991, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of title 5, United State Code.

1. *Date:* January 11, 1993.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review Reference Materials applications in Literature and General Bibliography, submitted to the Division of Research Programs, for projects beginning after July 1, 1993.

2. *Date:* January 13, 1993.

Time: 9 a.m. to 5 p.m.

Room: 430.

Program: This meeting will review applications for a Special Opportunity in Archival Research, submitted to the Division of Research Programs, for projects beginning after February 1, 1993.

3. *Date:* January 14-15, 1993.

Time: 8:30 a.m. to 5 p.m.

Room: M-14.

Program: To review applications submitted to the Humanities Projects in Museums and Historical Organizations program, submitted to the Division of Research Programs, for projects beginning after April 1, 1993.

4. *Date:* January 15, 1993.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review Reference Materials applications in American Studies, submitted to the Division of Research Programs, for projects beginning after July 1, 1993.

5. *Date:* January 22, 1993.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review Reference Materials applications in Visual Arts, Architecture and Performing Arts, submitted by the Division of Research Programs, for projects beginning after July 1, 1993.

6. *Date:* January 25-26, 1993.

Time: 8:30 a.m. to 5 p.m.

Room: 415.

Program: This meeting will review applications for Preservation of Material Culture Collections, submitted to the Division of Preservation and Access, for projects beginning after June 1, 1993.

7. *Date:* January 25-26, 1993.

Time: 8:30 a.m. to 5 p.m.

Room: M-09.

Program: This meeting will review applications submitted to the Humanities Projects in Museums and Historical Organization, submitted to the Division of Public Programs, for projects beginning after July 1, 1993.

8. *Date:* January 26, 1993.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review Reference Materials applications in Ancient Studies, submitted to the Division of Public Programs, for projects beginning after July 1, 1992.

9. *Date:* January 28, 1993.

Time: 8:30 a.m. to 5 p.m.

Room: 415.

Program: This meeting will review applications in Documentation of Collections Projects, submitted to the Division of Presentation and Access, for projects beginning after June 1, 1993.

10. *Date:* January 28-29, 1993.

Time: 8:30 a.m. to 5 p.m.

Room: 730.

Program: This meeting will review applications submitted to the Humanities Projects in Museums and Historical Organizations program, submitted to the Division of Public Programs, for projects beginning after July 1, 1993.

11. *Date:* January 28, 1993.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review applications for projects in Humanities Studies of Science and Medicine in Interpretive Research, submitted to the Division of Research Programs, for projects beginning after July 1, 1993.

Date: January 29, 1993.

Time: 8:30 a.m. to 5 p.m.

Room: 415.

Program: This meeting will review applications for Preservation of Material Culture Collections, submitted to the Division of Preservation and Access, for projects beginning after June 1, 1993.

13. *Date:* January 29, 1993.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review Reference Materials applications in Modern History and the Social Sciences, submitted to the Division of Research Programs, for projects beginning after July 1, 1993.

David C. Fisher;

Advisory Committee, Management Officer.

[FR Doc. 92-31006 Filed 12-21-92; 8:45 am]

BILLING CODE 7536-01-M

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements: Office of Management and Budget (OMB) Review

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of OMB review of information collection.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* Modification to NRC Enforcement Policy, 10 CFR part 2, Appendix C, Exercise of Discretion for an Operating Facility.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* On occasion.

5. *Who will be required or asked to report:* Nuclear Reactor Licensees.

6. *An estimate of the number of responses:* 36 annually.

7. *An estimate of the total number of hours required annually to complete the requirement or request:* 1,440 hours (40 hours per request).

8. *An indication of whether section 3504(h), Public Law 96-511 applies:* Applicable.

9. *Abstract:* The proposed change to Appendix C, 10 CFR part 2, modifies NRC's Enforcement Policy to more fully describe the circumstances in which the NRC may exercise enforcement discretion. This provision relates to circumstances which may arise when a licensee's compliance with a Technical Specification Limiting Condition for Operation or with other license conditions would involve an unnecessary plant transient or performance of testing, inspection, or system realignment that is inappropriate with the specific plant conditions, or unnecessary delays in plant startup without a corresponding health and safety benefit. A licensee seeking the exercise of enforcement discretion must provide a written justification, which documents the safety basis for the request and provides whatever other information the NRC staff deems necessary to decide whether or not to exercise discretion.

Copies of the submittals may be inspected or obtained for a fee from the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC 20555.

Comments and questions should be directed to the OMB reviewer: Ronald Minsk, Office of Information and Regulatory Affairs (3150-0136), NEOB-3019, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395-3084. The NRC

Clearance Officer is Brenda Jo. Shelton, (301) 492-8132.

Dated at Bethesda, Maryland, this 11th day of December 1992.

For the Nuclear Regulatory Commission.

Gerald F. Cranford,

Designated Senior Official for Information Resources Management.

[FR Doc. 92-31028 Filed 12-21-92; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-31609; File No. SR-NASD-91-73]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Failures to Comply with Arbitration Awards

December 16, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 19, 1992, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD.¹ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Article VI, Section 3 of the NASD By-Laws. New language is italicized; deleted language is in brackets.

¹ The NASD has amended the proposed rule change three times subsequent to its original filing on December 26, 1991. Amendment No. 1, submitted on May 6, 1992, provided the results of a vote of the NASD membership on the proposed rule change. The proposal was approved with 2,070 voting in favor, 204 opposed and 9 not voting, out of 2,283 ballots received. On July 2, 1992, the NASD filed Amendment No. 2 to the proposed rule change. Amendment No. 2 was submitted to add additional descriptive language to the filing. Amendment No. 3 was submitted on November 19, 1992 to conform the language of the filing to that of section 15A(h)(3) of the Act. As originally filed by the NASD, the proposal provided for the suspension or cancellation of membership or registration on a summary basis. Amendment No. 3 provides that such suspensions or cancellations will be in accordance with revocations proceedings provided under Article VI of the NASD's Code of Procedure. The substance of these amendments is included in this notice. Copies of all three amendments are available in the Commission's Public Reference Room.

Article VI of the NASD By-Laws Dues, Assessments and Other Charges

Suspension or Cancellation of Membership or Registration [for Non-Payment of Dues]

Sec. 3. The Corporation after fifteen (15) days notice in writing, may suspend or cancel the membership of any member or the registration of any person in arrears in the payment of any fees, dues, assessments or other charges, or for failure to furnish any information or reports requested pursuant to section 2 of this Article, or for failure to comply with an award of arbitrators properly rendered pursuant to section 41 of the Code of Arbitration Procedure, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The NASD is proposing to amend Article VI, section 3 of the NASD By-Laws to permit the NASD to suspend the membership or registration of a party that has failed to comply with a valid arbitration award, where the award is not the subject of a motion to vacate or modify the award or where such a motion has been denied.

The NASD is concerned regarding the significant number of referrals made to District Business Conduct Committees for failure to pay arbitration awards, and the impact such referrals have had on the Districts' complaint dockets. In order to address this problem, the NASD is proposing to extend its suspension and cancellation procedures (hereinafter referred to jointly as "revocation proceedings") to include situations in which members or registered persons fail to comply with arbitration awards.

Currently, the NASD's Code of Arbitration Procedure contains a Resolution of the Board of Governors

("Resolution") (paragraph 3744, page 3726 of the NASD Manual) which states that failure to pay an arbitration award properly rendered by any one of several arbitration forums may be deemed "conduct inconsistent with just and equitable principles of trade and a violation of Article III, section 1 of the Rules of Fair Practice" of the NASD. The Resolution contemplates the bringing of a disciplinary action against a member firm or associated person for failing to pay an arbitration award rendered by the NASD, or a self-regulatory organization which administers the Securities Industry Conference on Arbitration's Uniform Code ("Uniform Code"), or by the American Arbitration Association ("AAA").

The NASD's Arbitration Department has referred numerous cases to the NASD's District Business Conduct Committees for disciplinary action for failing to pay an arbitration award.² The NASD also routinely investigates and brings disciplinary actions for failing to pay arbitration awards whenever such violations are discovered, whether through referrals from other NASD departments, referrals from other self-regulatory organizations, through routine or non-routine investigations or through customer complaints.

In addition to enforcing arbitration awards rendered in NASD arbitrations, the intent of the Resolution was to permit the NASD to enforce awards rendered by other self-regulatory organizations that administer the Uniform Code, as well as to the AAA. The NASD regarded the broad scope of the resolution as necessary and appropriate if the NASD were to recommend arbitrations forums other than its own, such as AAA, as appropriate for resolution of disputes. The recommendation of alternative forums by securities industry self-regulatory organizations was encouraged by the SEC to alleviate the perception of unfairness in mandatory securities industry arbitration.

The NASD has determined, however, that bringing formal disciplinary actions for failure to pay an arbitration award rendered by the NASD's arbitration forum may not be the most efficient method of disposing of such matters. The proposal would allow the NASD, in addition to bringing a formal disciplinary action, to employ its revocation proceedings for a member's

or associated person's failure to pay an arbitration award rendered by an NASD arbitration panel. Thus, with respect to arbitration awards rendered in the NASD's arbitration forum, and which are subject to the NASD's administrative control, the NASD will not be required to initiate a formal disciplinary action against a member or associated person for failing to pay an arbitration award.³ As with formal disciplinary actions brought pursuant to the Resolution, such revocation proceedings are proposed to be available only where a timely motion to vacate or modify the arbitration award has not been failed.

The Resolution also provides that the failure to submit a dispute to arbitration as required by the NASD's Arbitration Code or failure to appear or to produce documents as directed pursuant to the NASD's Arbitration Code may be deemed "conduct inconsistent with just and equitable principles of trade" in violation of Article III, section 1 of the Rules of Fair Practice. These provisions also contemplate the bringing of a disciplinary action against a firm or associated person for failing to submit a claim to arbitration as required or for failing to appear or produce documents as required. The NASD's Arbitration Department will continue to evaluate cases for referral for disciplinary action where a member or associated person has failed to submit a claim to arbitration as required or where a member or associated person has failed to appear or produce documents as required. Finally, the NASD also will continue to evaluate cases for referral for disciplinary action where it is discovered that a member or associated person has failed to pay an arbitration award validly rendered by an arbitration forum other than the NASD or failure to pay NASD awards entered against it in a timely manner in accordance with section 41(h) of the Code.

The NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act. The proposed rule change is designed to encourage member firms and associated persons to pay duly rendered arbitration awards and to ease the burden on the District Business Conduct Committee's complaint docket. The payment of arbitration awards and the facilitation of the arbitration process, in general, will assist in the protection of investors and further the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Association does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the *Federal Register* or within such longer period (i) as the Commission may designate up to 90 days of such date if its finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by January 12, 1993.

² In 1991 the Arbitration Department referred 122 cases to the NASD's district offices for investigation of failure to pay an arbitration award rendered in the NASD's arbitration forum. In 1990 the Arbitration Department referred 82 cases for failure to pay arbitration awards.

³ Revocation proceedings implemented under Article VI, Section 3 of the By-Laws or subject to review by a hearing panel upon written request of the aggrieved member or associated person. See Article VI or the NASD's Code of Procedure.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Jonathan G. Katz,

Secretary.

[FR Doc. 92-30993 Filed 12-21-92; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Cincinnati Stock Exchange, Inc.

December 16, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

New York State Electric & Gas Corp.
3.75% Cum. Pfd., \$100.00 Par Value (File No. 7-9820)

New York State Electric & Gas Corp.
8.80% Pfd. Cum. Ser., \$100.00 Par Value (File No. 7-9821)

New York State Electric & Gas Corp.
8.48% Cum. Pfd. Ser., \$25.00 Par Value (File No. 7-9822)

Niagra Mohawk Power Corp.
3.40% Pfd. Ser., \$100.00 Par Value (File No. 7-9823)

Niagra Mohawk Power Corp.
3.60% Pfd. Ser., \$100.00 Par Value (File No. 7-9824)

Niagra Mohawk Power Corp.
3.90% Pfd. Ser., \$100.00 Par Value (File No. 7-9825)

Niagra Mohawk Power Corp.
4.10% Pfd. Ser., \$100.00 Par Value (File No. 7-9826)

Niagra Mohawk Power Corp.
5.25% Pfd. Ser., \$100.00 Par Value (File No. 7-9827)

Niagra Mohawk Power Corp.
4.85% Pfd. Ser., \$100.00 Par Value (File No. 7-9828)

Niagra Mohawk Power Corp.
6.10% Pfd. Ser., \$100.00 Par Value (File No. 7-9829)

Niagra Mohawk Power Corp.
7.72% Pfd. Ser., \$100.00 Par Value (File No. 7-9830)

Niagra Mohawk Power Corp.
Adj. Rte. Pfd. Ser. A, \$25.00 Par Value (File No. 7-9831)

Niagra Mohawk Power Corp.
8.75% Pfd. Ser., \$25.00 Par Value (File No. 7-9832)

Norfolk Southern Railway Co.
\$2.60 Com. Pfd., Ser. A, No Par Value (File No. 7-9833)

Northern Indiana Public Service, Co.
Adj. Rte. Cum. Pfd., Ser. A, \$50.00 Par Value (File No. 7-9834)

Northern States Power Co.
\$3.60 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9835)

Northern States Power Co.

\$4.08 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9836)

Northern States Power Co.
\$4.10 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9837)

Northern States Power Co.
\$4.11 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9838)

Northern States Power Co.
\$4.16 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9839)

Carter Hawley Hale Stores
Common Stock, \$0.01 Par Value (File No. 7-9840)

Charles Schwab Corp.
Common Stock, \$0.01 Par Value (File No. 7-9841)

El Paso Refinery, L.P.
Pfd. Units, No Par Value (File No. 7-9842)

Reading & Bates Corp.
Common Stock, \$0.05 Par Value (File No. 7-9843)

Resource Mortgage Capital, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9844)

Central Maine Power Co.
Div. Ser. Pfd., 7 7/8% Ser., \$100.00 Par Value (File No. 7-9845)

Northern States Power Co.
\$4.56 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9846)

Northern States Power Co.
\$6.80 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9847)

Northern States Power Co.
\$7.00 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9848)

Northern States Power Co.
\$7.84 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9849)

Northern States Power Co.
\$8.80 Ser. Cum. Pfd., \$100.00 Par Value (File No. 7-9850)

NS Group, Inc.
Common Stock, No Par Value (File No. 7-9851)

Nuveen California Select Quality Municipal Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9852)

Nuveen Municipal Advantage Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9853)

Nuveen Municipal Market Opportunity Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9854)

Nuveen Municipal Value Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9855)

Nuveen New Jersey Investment Quality Municipal Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9856)

Nuveen New York Select Quality Municipal Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9857)

Nuveen Pennsylvania Investment Quality Municipal Fund, Inc.
Common Stock, \$0.01 Par Value (File No. 7-9858)

Nuveen Premium Income Municipal Fund, Inc.

Common Stock, \$0.01 Par Value (File No. 7-9859)

Ogden Projects, Inc.
Common Stock, \$0.50 Par Value (File No. 7-9860)

Ohio Edison Co.
3.90% Pfd., \$100.00 Par Value (File No. 7-9861)

Ohio Edison Co.
4.40% Pfd., \$100.00 Par Value (File No. 7-9862)

Ohio Edison Co.
4.56% Pfd., \$100.00 Par Value (File No. 7-9863)

Ohio Edison Co.
4.44% Pfd., \$100.00 Par Value (File No. 7-9864)

Ohio Edison Co.
7.24% Pfd., \$100.00 Par Value (File No. 7-9865)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before January 8, 1993, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-30935 Filed 12-21-92; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Midwest Stock Exchange, Inc.

December 16, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Chart Industries, Inc.

Common Stock, \$.01 Par Value (File No. 7-9798)
First Colony Corporation
 Common Stock, No Par Value (File No. 7-9799)
Maybelline, Inc.
 Common Stock, \$.01 Par Value (File No. 7-9800)
Tejas Gas Corporation
 Common Stock, \$.25 Par Value (File No. 7-9801)
Uni-Marts, Inc.
 Class A Common Stock, \$.10 Par Value (File No. 7-9802)
Betz Laboratories, Inc.
 Common Stock, \$.10 Par Value (File No. 7-9803)
Santa Fe Energy Trust
 Depository Shares (evidenced by Secure Principal Energy Receipts consisting of interests in Santa Fe Energy Trust and a United States Treasury Obligation): No Par Value (File No. 7-9804)
Sunair Electronics, Inc.
 Common Stock, \$.10 Par Value (File No. 7-9805)

These securities are listed and registered on one or more other national securities exchange and is reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before January 8, 1993, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,
 Secretary.

[FR Doc. 92-30933 Filed 12-21-92; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Pacific Stock Exchange, Inc.

December 16, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder

for unlisted trading privileges in the following securities:

Chiquita Brands International, Inc.
 \$1.32 Dep. Shares (rep. 1/2 share of Series C Mand. Exch. Cum. Pref. Stock) (File No. 7-9791)
Hibernia Corporation
 Rights (expires December 10, 1992) (File No. 7-9792)
NTN Communications, Inc.
 Common Stock, \$0.005 Par Value (File No. 7-9793)
Terra Industries, Inc.
 Common Stock, No Par Value (File No. 7-9794)
Thermo Fibertek, Inc.
 Common Stock, \$.01 Par Value (File No. 7-9795)
UDC Homes, Inc.
 Common Stock, \$.01 Par Value (File No. 7-9796)
Worldtex, Inc.
 Common Stock, \$.01 Par Value (File No. 7-9797)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before January 8, 1992, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,
 Secretary.

[FR Doc. 92-30932 Filed 12-21-92; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Inc.

December 16, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder

for unlisted trading privileges in the following securities:

Digitran Systems Incorporated
 8% Cum. Pfd Stock (File No. 7-9806)
First Chicago Corporation
 Depository Shares, 1/25 of a share of 8.45 Pct. Cum. Pfd Stock Series E (File No. 7-9807)
Tejas Gas Corporation
 Common Stock, \$0.25 Par Value (File No. 7-9808)
First Colony Corporation
 Common Stock, \$0.01 Par Value (File No. 7-9809)
Bank of New York Company, Inc.
 Depository Shares, 8.60 Cum. Pfd Stock (File No. 7-9810)
Chart Industries, Inc.
 Common Stock, \$0.01 Par Value (File No. 7-9811)
Wellsford Residential Property Trust
 Common Shares of Beneficial Interest, \$0.01 Par Value (File No. 7-9812)
Maybelline, Inc.
 Common Stock, \$0.01 Par Value (File No. 7-9813)
Sunair Electronics, Inc.
 Common Stock, \$.10 Par Value (File No. 7-9814)
Health Care Reit
 Common Stock, \$1 Par Value (File No. 7-9815)
General Motors Corporation
 Series G 9.12 Pct Depository Shares (File No. 7-9816)
MuniYield New York Insured Fund III
 Common Stock, \$.10 Par Value (File No. 7-9817)
Banco Bilbao Vizcaya International Gibraltar Limited
 American Depository Shares, Non Cum. Guaranteed Pfd Stock (File No. 7-9818)
Betz Laboratories, Inc.
 Common Stock, \$.10 Par Value (File No. 7-9819)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before January 8, 1993, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-30934 Filed 12-21-92; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 1740]

U.S. Organizations for the International Radio Consultative Committee (CCIR) and International Telegraph and Telephone Committee (CCITT); Meeting

The Department of State announces that the U.S. Organizations for the International Radio Consultative Committee (CCIR National Committee) and International Telegraph and Telephone Consultative Committee (CCITT National Committee) will hold a joint open meeting, January 12, 1993 at the Department of State, 2201 C Street, NW., Washington, DC, in room 1105, from 9:30 a.m. to 12:30 p.m.

During the afternoon the two National Committees will hold separate meetings—the CCIR National Committee will meet in room 1207; at the same time, the CCITT National Committee will hold its open meeting in room 1105, beginning at 1:30 p.m.

The CCIR and CCITT are permanent organs of the International Telecommunication Union (ITU), a specialized agency of the United Nations, established by the International Telecommunication Convention.

The agenda for the meetings will consist of a briefing of the recently concluded ITU's Additional Plenipotentiary Conference, a review of the issues related to the January meetings of the CCIR Resolution 106 and CCITT Resolution 18 Groups, and the joint meeting between those two international groups scheduled for January 22 in Geneva.

Entrance to the Department of State is controlled but can be facilitated by making attendance arrangements in advance. Persons planning to attend the meeting should so advise this office at: (202) 647-0201, (fax (202) 647-7407) no later than two days before the meeting. Notification should include name, date of birth and Social Security number. All attendees must use the C Street entrance.

Dated: December 7, 1992.

Warren G. Richards,
Chairman, U.S. CCIR National Committee

Earl S. Barbely,

Chairman, U.S. CCITT National Committee.

[FR Doc. 92-30949 Filed 12-21-92; 8:45 am]

BILLING CODE 4710-45-M

[Public Notice 1739]

Overseas Schools Advisory Council; Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Annual Meeting on Tuesday, January 26, 1993, at 9:30 a.m. in Conference Room 1105, Department of State Building, 2201 C Street, NW., Washington, DC. The meeting is open to the public.

The Overseas Schools Advisory Council works closely with the U.S. business community in improving those American-sponsored schools overseas which are assisted by the Department of State and which are attended by dependents of U.S. government families and children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. Access to the State Department is controlled and individual building passes are required for each attendee. Entry will be facilitated if arrangements are made in advance of the meeting. Persons who plan to attend should so advise the office of Dr. Ernest N. Mannino, Department of State, telephone (703) 875-7800, prior to January 26. All attendees must use the C Street entrance to the building.

Dated: December 7, 1992.

Ernest N. Mannino,
Executive Secretary, Overseas Schools Advisory Council.

[FR Doc. 92-30950 Filed 12-21-92; 8:45 am]

BILLING CODE 4710-24-M

[Public Notice 1741]

Shipping Coordinating Committee, Subcommittee on Safety of Life at Sea, Working Group on Radiocommunications; Meetings

The Working Group on Radiocommunications of the Subcommittee on Safety of Life at Sea

will conduct open meetings at 9:30 a.m. on February 17, April 21, May 19, and June 16, 1993. These meetings will be held in the Department of Transportation Headquarters Building, 400 Seventh Street, SW., Washington, DC 20950.

The purpose of these meetings is to prepare for the 39th Session of the Internal Maritime Organization (IMO) Subcommittee on Radiocommunications which is scheduled for late 1993 at the IMO headquarters in London, England.

Agenda items include preparation for the 39th Session, primarily related to the implementation of the Global Maritime Distress and Safety System (GMDSS).

Members of the public may attend these meetings up to the seating capacity of the room.

For further information and meeting room number, contact Mr. Ronald J. Grandmaison, U.S. Coast Guard Headquarters (G-TTM), 2100 Second Street, SW., Washington, DC 20593-0001. Telephone: (202) 267-1389.

Dated: December 1, 1992.

Geoffrey Ogden,

Chairman, Shipping Coordinating Committee.

[FR Doc. 92-30947 Filed 12-21-92; 8:45 am]

BILLING CODE 4710-70-M

Office of the Secretary

[Public Notice No. 1742]

McAllen/Mission/Hidalgo, Texas, (Anzalduas International Crossings), Application for Bridge Permit

Notice is hereby given that the Department of State has received an application for a permit authorizing construction of a vehicle bridge and a railroad bridge across the Rio Grande River from McAllen/Mission/Hidalgo, Texas, to Reynosa, Tamaulipas, Mexico.

The Department's jurisdiction with respect to this application is based upon Executive Order 11423, dated August 16, 1968, and the International Bridge Act of 1972 (Pub. L. 92-434, 86 Stat. 731, 33 U.S.C. 535 approved September 26, 1972).

As required by E.O. 11423, the Department of State is circulating this application to concerned agencies for comment.

Interested persons may submit their views regarding the application in writing by January 21, 1993, to Mr. Irwin Rubenstein, Coordinator, U.S. Mexico Border Affairs, ARA/MEX, room 4258, U.S. Department of State, Washington, DC 20520.

The application and related documents made part of the record to be

considered by the Department of State in connection with this application are available for inspection in the Office of Mexican Affairs during normal business hours.

Any questions relating to this notice may be addressed to the Coordinator, U.S.-Mexico Border Affairs, at the above address or by telephone, No. (202) 647-9894.

Dated: December 14, 1992.

Irwin Rubenstein,

Coordinator, U.S.-Mexico Border Affairs,
Office of Mexican Affairs.

[FR Doc. 92-30953 Filed 12-21-92; 8:45 am]

BILLING CODE 4710-10-M

DEPARTMENT OF TRANSPORTATION

Order Adjusting International Cargo Rate Flexibility Level

Policy Statement PS-109, implemented by Regulation ER-1322 of the Civil Aeronautics Board and adopted by the Department, established geographic zones of cargo pricing flexibility within which certain cargo rate tariffs filed by carriers would be subject to suspension only in extraordinary circumstances.

The Standard Foreign Rate Level (SFRL) for a particular market is the rate in effect on April 1, 1982, adjusted for the cost experience of the carriers in the applicable ratemaking entity. The first adjustment was effective April 1, 1983. By Order 92-10-7, the Department established the currently effective SFRL adjustments.

In establishing the SFRL for the two-month period beginning December 1, 1992, we have projected non-fuel costs based on the year ended September 30, 1992 data, and have determined fuel prices on the basis of the latest available experienced monthly fuel cost levels as reported to the Department.

By Order 92-12-20 cargo rates may be adjusted by the following adjustment factors over the April 1, 1982, level:

Atlantic—1.2782

Western Hemisphere—1.1872

Pacific—1.5854

For further information contact: Keith A. Shangraw (202) 366-2439.

By the Department of Transportation:
December 16, 1992.

Patrick V. Murphy,

Deputy Assistant Secretary for Policy and
International Affairs.

[FR Doc. 92-31040 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-62-M

[Docket 37554]

Order Adjusting the Standard Foreign Fare Level Index

The International Air Transportation Competition Act (IATCA) Public Law 96-192, requires that the Department, as successor to the Civil Aeronautics Board, establish a Standard Foreign Fare Level (SFFL) by adjusting the SFFL base periodically by percentage changes in actual operating costs per available seat-mile (ASM). Order 80-2-89 established the first interim SFFL, and Order 92-10-4 established the currently effective two-month SFFL applicable through November 30, 1992.

In establishing the SFFL for the two-month period beginning December 1, 1992, we have projected non-fuel costs based on the year ended September 30, 1992 data, and have determined fuel prices on the basis of the latest available experienced monthly fuel cost levels as reported to the Department.

By Order 92-12-19 fares may be increased by the following adjustment factors over the October 1979 level:

Atlantic—1.5633

Latin America—1.4406

Pacific—2.0465

Canada—1.4570

For further information contact: Keith A. Shangraw (202) 366-2439.

By the Department of Transportation:
December 16, 1992.

Patrick V. Murphy,

Deputy Assistant Secretary for Policy and
International Affairs.

[FR Doc. 92-31039 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-62-M

Federal Aviation Administration

Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Sioux Gateway Airport, Sioux City, IA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The Federal Aviation Administration (FAA) proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Sioux Gateway Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) Pub. L. 101-508 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before January 21, 1993.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Central Region, Airports Division, 601 E. 12th Street, Kansas City, MO. 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Randall S. Curtis, Executive Director, Sioux Gateway Airport, at the following address: Sioux Gateway Airport Authority, Sioux Gateway Airport, 2403 Ogden Ave., Sioux City, IA 51110.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Sioux Gateway Airport Authority under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Ellie Anderson, PFC Coordinator, FAA, Central Region, Airports Division, 601 E. 12th Street, Kansas City, MO 64106, (816) 426-7425. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Sioux Gateway Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On December 8, 1992, the FAA determined that the application to impose and use the revenue from a PFC submitted by Sioux Gateway Airport Authority was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 12, 1993.

The following is a brief overview of the application:

Level of the proposed PFC: \$3.00.

Proposed charge effective date: May 1, 1993.

Proposed charge expiration date: May 1, 1994.

Total estimated PFC revenue: \$200,824.

Brief description of proposed projects: Taxiway "C" Extension; Installation of Fencing and Purchase of Snow Removal Equipment; Security Access System Installation; Runway Sweeper Acquisition; Taxiway "A" and "E" Rehabilitation.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: none.

Any person may inspect the application in person at the FAA office

listed above under "FOR FURTHER INFORMATION CONTACT".

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Sioux Gateway Airport, Sioux City, IA.

Issued in Kansas City, Missouri on December 8, 1992.

George A. Henden,

Manager, Airports Division, Central Region.

[FR Doc. 92-31001 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-13-M

National Highway Traffic Safety Administration

[Docket No. 92-20; Notice 1]

Petition for Approval of Alternate Odometer Disclosure Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of preliminary determination.

SUMMARY: The odometer disclosure requirements set forth procedures (49 CFR 580.11) by which a State may petition for approval of alternate requirements to those in §§ 580.5 and 580.7 which identify the required elements of the disclosure statement. The State of Oregon has submitted a petition pursuant to 49 CFR 580.11 for approval of alternate disclosure requirements. On balance, NHTSA believes that the proposed system poses some threat to the integrity of the current system without sufficient benefit to outweigh that threat. Accordingly, NHTSA preliminarily denies Oregon's petition for approval of the proposed alternate disclosure requirements.

DATES: Comments are due no later than January 21, 1993.

ADDRESSES: Written comments should refer to the docket number of this notice and should be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are 9:30 a.m. to 4 p.m.)

FOR FURTHER INFORMATION CONTACT: Kathleen DeMeter, Office of the Chief Counsel, room 5219, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 (202) 366-1834.

SUPPLEMENTARY INFORMATION:

Background

The Truth in Mileage Act of 1986 (Pub. L. 99-579), 15 U.S.C. 1981, *et seq.*

(TIMA) requires each person transferring ownership of a motor vehicle to disclose the vehicle's mileage on the vehicle's title. The law directs the States to conform their titles and titling procedures to enable the titles to be used for odometer disclosure. The implementing regulations, 49 CFR part 580, set forth specific procedures and requirements which must be followed by States and those involved with commercial transactions.

The TIMA permits the administrative approval by NHTSA of alternate methods of odometer disclosure, provided those alternate methods are consistent with the purposes of the Act. The original final rule issued by NHTSA (53 FR 29464, August 5, 1988), set forth procedures (49 CFR 580.11) by which a State could petition for approval of alternate requirements to those in §§ 580.5 and 580.7 which identify the required elements of the disclosure statement.

The State of Oregon has submitted a petition pursuant to 49 CFR 580.11 for approval of alternate disclosure requirements.

Basis for the Petition

Oregon seeks approval for alternative procedures to those in 49 CFR 580.5(c) which require the titled owner of a vehicle to disclose the mileage on the title and not on a separate reassignment form. Oregon proposes to allow a titled owner to use a secure separate disclosure/reassignment document when the Motor Vehicle Division of the Oregon Department of Transportation (MVD) has possession of the title certificate because it has been submitted to perfect the security interest of the vehicle.

The Oregon petition states:

In Oregon, perfecting a security interest in a vehicle is accomplished by applying for a title reflecting that interest. The title certificate must be surrendered to us * * *. It is not always possible * * * to meet all requirements for title within the 10 days allowed [to perfect a security interest] under federal bankruptcy law. In some cases, incomplete requests for title [where the odometer disclosure has not been completed] are submitted to us solely to perfect a security interest in a timely manner * * *. If a transaction is returned, perfection does not occur * * *.

The petition further states that "[u]nder current Oregon law, we cannot return a title certificate where there is a security interest holder, even though the seller and buyer have not completed the required odometer disclosure."

Accordingly, Oregon proposes to "adopt rules that would allow sellers and buyers (including persons in whose

name the title was issued) to use a separate secure odometer disclosure/reassignment form when [the Oregon MVD has] and retain[s] possession of, the title certificate." Under the proposed alternative, the title certificate would be retained in division headquarters. When the completed secure odometer disclosure/reassignment form is received, it would be processed with the title certificate, and would become part of the title history of the vehicle.

NHTSA requested that Oregon provide a copy of applicable State laws and regulations and additional information supporting the petition. In an addendum to the petition, Oregon provides an example of how the alternative process would work. Party A (titled owner) sells a vehicle with the title. Party A fails to complete the required odometer disclosure on the title. The title is given to Party B (the buyer). Party B finances the purchase of the vehicle and surrenders the title to the lender. The lender submits the title to the MVD in order to receive a new title showing Party B as owner and lender as holder of a security interest in the vehicle. The title is submitted without the required odometer disclosure. The title is retained by the MVD, which sends a secure odometer disclosure/reassignment to Party B requesting the odometer disclosure be made on the form by party A and signed by both A and B. When the completed secure odometer disclosure/reassignment form is submitted back to MVD, it is matched with the title and the title application is processed.

Preliminary Determination

NHTSA has various substantive concerns regarding Oregon's proposal. NHTSA's central concern is that there does not appear to be sufficient justification for deviating from Congress' intent that odometer disclosures be made on the titles to vehicles and that separate disclosures be used as little as possible. Oregon provides no reason why, to follow the example set forth above, Party A cannot make the required disclosure. The example states merely that A does not make the disclosure. The remaining rationale behind the proposed alternative is that once A has failed to make the disclosure, B is allowed to avail himself of the alternate procedure to protect the security interest of B's financing lender.

This system appears to reward both A and B for being negligent—A for not making the disclosure and B for accepting a title without a proper disclosure. Moreover, since the seller's signature block is normally used for

both odometer disclosure and transfer of ownership of the vehicle, once A signs the title to accomplish the transfer of ownership, A has also, in effect, signed an incomplete, and therefore, false odometer disclosure statement.

In addition, NHTSA is concerned about the efficacy of the proposed system. If B could not get A to complete the title properly at the time of transfer of the title, why will B be any more successful in getting A to complete a separate form at some later date when A no longer has any stake in the process?

Oregon argues that its proposed system conforms to the intent of the Federal requirements because by the time the parties complete Oregon's proposed assignment form, the title will have been submitted to the State, which will issue a new title after the submission of the proposed separate form. Thus, any benefit to having the disclosure on the title, (i.e., protection and information for future buyers and access of buyer to title) will be reduced. The proposed procedure, it is further claimed, is consistent with Federal intent because the process will be controlled by MVD, and MVD's ability to detect odometer fraud will not be hampered.

NHTSA agrees that because of the immediate issuance of a new title, the proposed system would not have an adverse impact on the protection afforded to future buyers. NHTSA also respects MVD's commitment to control the forms and enforce the odometer laws. NHTSA disagrees, however, that there will be no effect on buyer access to title. In the example above, A could get B to give A a regular power of attorney to effect title transfer, in which case B might not see the title until the sale is complete and the title is signed, contrary to Congressional intent. Further, even if B does sign the title, a system that does nothing to discourage A from failing to provide the proper written mileage disclosure undermines Congressional intent that buyers receive written, accurate mileage information useful in the decision-making process on whether to purchase and how much to pay for a vehicle. For example, A could intentionally neglect to execute the written disclosure on the title because A has verbally misrepresented the mileage of the vehicle to B. When B contacts A to obtain a written disclosure on the proposed assignment form provided by MVD, A may still refuse to execute the disclosure because of the earlier verbal misrepresentation of the mileage. B would then have to convince A to negate the transfer and refund

payment, and if unable to do so, would be forced to take legal action.

On balance, NHTSA believes that the proposed system introduces a potential threat to the integrity of the current system without a sufficient countervailing benefit. Rather than encouraging parties to obey the law while accommodating the lender's security interests, the proposed system permits parties to vehicle transactions to avoid the law with questionable justification, and without any adverse consequences. Accordingly, NHTSA preliminarily denies Oregon's petition for approval of alternate disclosure requirements.

Written Comments

Interested persons are invited to comment on this notice. It is requested, but not required, that ten copies be submitted.

All comments must be limited to 15 pages in length. Necessary attachments may be appended to those submissions without regard to the 15-page limit. (49 CFR 553.21.) This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

Written comments to the public docket must be received by January 21, 1993. All comments received before the close of business on the comment closing date will be considered and will be available for examination in the docket at the above address before and after that date. To the extent possible, comments received after the comment closing date will also be considered. However, action on the petition may proceed at any time after that date. Following the close of the comment period, NHTSA will publish a final determination on the petition responding to the comments. NHTSA will continue to file relevant material in the docket as it becomes available after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments should enclose, in the envelope with their comments, a self-addressed, stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

Copies of all comments will be placed in Docket 92-20, Notice 1 of the NHTSA Docket Section in room 5109, Nassif Building, 400 7th Street, SW., Washington, DC 20590.

Issued on: December 17, 1992.

Paul Jackson Rice,
Chief Counsel, National Highway Traffic
Safety Administration.
(FR Doc. 92-30997 Filed 12-21-92; 8:45 am)
BILLING CODE 4810-59-M

Announcing the Tenth Meeting of the Motor Vehicle Safety Research Advisory Committee

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.
ACTION: Meeting announcement.

SUMMARY: This notice announces the tenth meeting of the Motor Vehicle Safety Research Advisory Committee (MVSAC). The Committee was established in accordance with the provisions of the Federal Advisory Committee Act to obtain independent advice on motor vehicle safety research. At this meeting the Committee will discuss offset frontal research, biomechanics, harm analysis, and NHTSA's Plan for Intelligent Vehicle Highway Systems. A status report on the recent activities of the Crashworthiness and Crash Data Subcommittees will also be presented.

DATE AND TIME: The meeting is scheduled to begin at 10:30 a.m. on Friday, January 15, 1993, and conclude at 4 p.m. that afternoon.

ADDRESSES: The meeting will be held in room 6248 of the U.S. Department of Transportation Building, which is located at 400 Seventh Street SW., Washington, DC.

SUPPLEMENTARY INFORMATION: In May 1987, the Motor Vehicle Safety Research Advisory Committee was established. The purpose of the Committee is to provide an independent source of ideas for motor vehicle safety research. The MVSAC will provide information, advice, and recommendations to NHTSA on matters relating to motor vehicle safety research, and provide a forum for the development, consideration and communication of motor vehicle safety research, as set forth in the MVSAC Charter.

The meeting is open to the public, but attendance may be limited due to space availability. Participation by the public will be determined by the Committee Chairman.

A public reference file (Number 88-01) has been established to contain the products of the Committee and will be open to the public during the hours of 9:30 a.m. to 4 p.m. at the National Highway Traffic Safety Administration's Technical Reference Division in room 5108 at 400 Seventh Street SW.,

Washington, DC 20590, telephone: (202) 366-2768.

FOR FURTHER INFORMATION CONTACT:

Mary Coyle, Office of Research and Development, 400 Seventh Street SW., room 6206, Washington, DC 20590, telephone: (202) 366-5926.

Issued on: December 16, 1992.

George L. Parker,

Chairman, Motor Vehicle Safety Research Advisory Committee.

[FR Doc. 92-30939 Filed 12-21-92; 8:45 am]

BILLING CODE 4910-59-M

[Docket No. 92-62; Notice 1]

Tentative Determinations That Certain Nonconforming Vehicles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Tentative determinations that certain nonconforming vehicles are eligible for importation.

SUMMARY: This notice requests comments on tentative determinations by the National Highway Traffic Safety Administration (NHTSA) that certain BMW, Mercedes-Benz, and Porsche passenger cars that were not originally manufactured to comply with the Federal motor vehicle safety standards are nevertheless eligible for importation into the United States because they

(1) Are substantially similar to motor vehicles which were originally manufactured to conform to the Federal standards and to be imported into and sold in the United States, and

(2) Are capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

DATES: The closing date for comments on these tentative determinations is January 21, 1993.

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) (the Act), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined, either pursuant to a petition or on its own initiative, that the motor vehicle is

substantially similar to a motor vehicle originally manufactured for importation into

and sale in the United States, certified under section 114 [of the Act], and of the same model year * * * as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards,

(section 108(c)(3)(A)(i)(I)) or that, "where there is no substantially similar United States motor vehicle," the agency has determined that

the safety features of the vehicle comply with or are capable of being modified to comply with all applicable Federal motor vehicle safety standards based on destructive test data or such other evidence as the Secretary determines to be adequate * * *

(section 108(c)(3)(A)(i)(II)).

The phrases "substantially similar" and "capable of being readily modified" are not defined in Public Law 100-562, the statute that added the import eligibility requirements to the Act. In the absence of a statutory definition, NHTSA takes the position that a vehicle is "substantially similar" to one that was originally manufactured and certified for importation into and sale in the United States if there are no more than minor differences between the two vehicles in visual appearance and structural detail, aside from any differences attributable to the noncompliance of one vehicle with the Federal motor vehicle safety standards.

NHTSA regards a vehicle as "capable of being readily modified" if its components that are subject to the Federal motor vehicle safety standards may be easily replaced with parts intended as replacements for conforming parts on substantially similar certified vehicles. These include, but are not limited to, components such as tires (Standard No. 109), rims (Standard No. 110), wheel covers (Standard No. 211), glazing (Standard No. 205), reflecting surfaces (Standard No. 107), controls and displays (Standard No. 101), lighting devices (Standard No. 108), brake hoses (Standard No. 106) and brake fluid (Standard No. 116).

To address compliance with standards that apply to the vehicle itself, as opposed to any of its equipment items, NHTSA focuses on whether the modifications necessary for conformance are "readily" achievable. Information demonstrating that compliance can be achieved without major structural modifications or destructive component testing is relevant to this issue. An example of a major structural modification would be strengthening of the rear frame rails or rear body structure to achieve conformance with Standard No. 301 *Fuel System Integrity*. An example of a

non-major structural modification would be installation of windshield retaining clips to achieve conformance with Standard No. 212 *Windshield Mounting*, or installation of reinforcing beams in doors to achieve conformance with Standard No. 214 *Side Door Strength*. In determining whether a vehicle is "capable of being readily modified," NHTSA finally presumes that a non-conforming vehicle that has a substantially similar U.S. certified counterpart will be more likely to incorporate structural features that are capable of being modified to conform than will a vehicle for which there is no substantially similar U.S. certified counterpart.

Over the years, the typical practice of manufacturers outside the United States who wish to sell passenger cars in the American market has been to offer versions of their home market products that they have re-engineered to conform to the Federal motor vehicle safety standards. To so-called "gray market" is comprised of foreign motor vehicles not originally manufactured to conform to the U.S. standards. In many instances, these vehicles are equipped with a body whose visual appearance, other than lighting equipment, bumpers, and rear view mirrors, is identical to that of U.S. certified vehicles, and share with those vehicles a large number of identical structural components.

In making a determination of eligibility for importation, NHTSA is required by section 108(c)(3)(C)(iii) of the Act to give due consideration to any test data or other information available to it. The primary information available to the agency consists of its own records pertaining to the importation of noncomplying motor vehicles under bond over the years, and data submitted by the importers of those vehicles to substantiate statements that they had been brought into compliance with all applicable Federal motor vehicle safety standards.

On November 13, 1990, NHTSA published a Notice of Final Determinations (55 FR 47418) identifying 172 separate models of nonconforming passenger cars as eligible for importation into the United States. Those determinations were based on the finding that each of the covered vehicles is substantially similar to a vehicle of the same model year that was originally manufactured for importation into and sale in the United States and that was certified under section 114 of the Act, and that each of the covered vehicles is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards. Of the passenger cars for which final

determinations were made, 59 were BMW models, 83 were Mercedes-Benz models, and 19 were Porsche models. These accounted for all but 11 of the vehicles that were the subject of the first Final Determinations that NHTSA made upon its own initiative. A complete listing of these vehicles, by make, model, and model year, appears in an Annex to the Notice of Final Determinations at 55 FR 47421-22.

NHTSA continued to review manufacturers' records of vehicles certified for sale in this country and its enforcement files to identify vehicles for which a sufficient number of acceptable compliance statements had been submitted to permit a determination of import eligibility to be made. On November 30, 1991, the agency published a second Notice of Final Determinations (56 FR 58603), identifying an additional 95 models of passenger cars as eligible for importation into the United States. Of those passenger cars, 37 were BMW models, 47 were Mercedes-Benz models, and 3 were Porsche models, accounting for all but 8 of the vehicles that were the subject of those Final Determinations. A complete listing of these vehicles, by make, model, and model year, appears in Annex A to the Notice of Final Determinations at 56 FR 58604.

In addition to the final determinations of import eligibility that it made on its own initiative under section 108(c)(3)(C)(i)(II) of the Act, NHTSA has also made a number of final determinations under section 108(c)(3)(C)(i)(I), based on petitions submitted by importers of motor vehicles who have registered with the agency pursuant to 49 CFR part 592. Of the 17 such determinations that have been made to date, 6 have pertained to BMW vehicles, and 4 to Mercedes-Benz vehicles.

Based on the volume of import eligibility determinations that it has made with respect to BMW, Mercedes-Benz, and Porsche passenger cars, as well as its understanding that a U.S. certified counterpart exists for virtually every such vehicle manufactured for sale in other countries, NHTSA believes that justification exists for the agency to make a blanket determination that, with certain limited exceptions, all BMW, Mercedes-Benz, and Porsche passenger cars manufactured before September 1, 1989, are eligible for importation. September 1, 1989, was selected as the cutoff date because all passenger cars manufactured after that date must comply with the automatic restraint requirements of Standard No. 208 *Occupant Crash Protection*. NHTSA has denied several import eligibility

petitions for passenger cars manufactured after September 1, 1989, because the importer has failed to submit adequate data to verify that the car is capable of being readily modified to conform to the standard's automatic restraint requirements. NHTSA also selected September 1, 1989, as the cutoff date because a decision as to whether a passenger car equipped with an air bag meets the automatic restraint requirements would impose an undue burden on U.S. customs inspectors.

As specified in the Annex to this notice, the blanket import eligibility determinations that NHTSA has tentatively made do not include Model ID 114 and 115 Mercedes-Benz vehicles with sales designations "long," "station wagon," or "ambulance," BMW vehicles in the M1 and Z1 series, and the Porsche 959. These vehicles have been excluded from the blanket determinations because they do not appear to have any substantially similar U.S. certified counterparts.

If these tentative determinations are ultimately made final, they have the potential for reducing the administrative burden and costs associated with NHTSA's processing of individual import eligibility petitions on the vehicles covered while eliminating the hardship faced by importers in awaiting decisions on those petitions. Additionally, these tentative determinations would promote efficiency by producing a comprehensive list of BMW, Mercedes-Benz, and Porsche passenger cars manufactured prior to September 1, 1989, that are eligible for importation, supplanting the need for importers to rely on Federal Register notices of final determination that would otherwise be issued on an individual basis as petitions for the covered vehicles are received and processed by NHTSA.

Tentative Determinations

Accordingly, on the basis of the foregoing, NHTSA hereby tentatively determines that each of the passenger cars listed in the Annex to this notice is substantially similar to a passenger car originally manufactured for importation into and sale in the United States, certified under section 114 of the National Traffic and Motor Vehicle Safety Act, and of the same model year, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Proposed Importation Code Numbers for Vehicles Covered by These Tentative Determinations

The importer of a vehicle admissible under any final determination must

indicate on the Form HS-7 accompanying entry the appropriate importation code number indicating that the vehicle is eligible for entry. Proposed importation code numbers for the vehicles that are covered by these tentative determinations appear in the first column of the list in the Annex to this notice under the heading "Proposed VSA#." If these tentative determinations are ultimately made final, the import eligibility numbers that NHTSA has proposed would replace any individual numbers that NHTSA has assigned in final determinations that it has previously made on all covered BMW, Mercedes-Benz, and Porsche vehicles. The agency invites comments on this aspect of the proposal.

Comments

Section 108(c)(3)(C)(iii) requires NHTSA to provide a minimum period for public notice and comment on the determinations made on its own initiative consistent with ensuring expeditious, but full consideration and avoiding delay by any person. NHTSA believes that a minimum comment period of 30 days is appropriate for this purpose. Interested persons are invited to submit comments on the tentative determinations described above. It is requested, but not required, that five copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of NHTSA's final determination will be published in the *Federal Register* pursuant to the authority indicated below.

Comment closing date: January 21, 1993.

Authority: 15 U.S.C. 1397(c)(3)(A)(i)(I) and 1397(c)(3)(C)(iii); 49 CFR 593.8; delegation of authority at 49 CFR 1.50.

Issued on: December 15, 1992.

Marion C. Blakey,
Administrator.

ANNEX A.—PASSENGER CARS MANUFACTURED BEFORE SEPTEMBER 1, 1989, COVERED BY TENTATIVE DETERMINATIONS

Proposed VSA#	Make	Models covered
77	Mercedes-Benz.	All except Model ID 114 and 115 with sales designations "long," "station wagon," or "ambulance."

ANNEX A.—PASSENGER CARS MANUFACTURED BEFORE SEPTEMBER 1, 1989, COVERED BY TENTATIVE DETERMINATIONS—Continued

Proposed VSA#	Make	Models covered
78	BMW	All except the M1 and Z1 series.
79	Porsche	All except Model 959.

[FR Doc. 92-30995 Filed 12-21-92; 8:45 am]
BILLING CODE 4810-50-M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Department Circular—Public Debt Series—No. 40-92]

Treasury Notes of December 31, 1994, Series AH-1994 (CUSIP No. 912827 H9 6)

Washington, December 16, 1992.

1. Invitation for Tenders

1.1 The Secretary of the Treasury, under the authority of chapter 31 of title 31, United States Code, invites tenders for United States securities, as described above and in the offering announcement, hereafter referred to as Notes. The Notes will be sold at auction, and bidding will be on a yield basis. Payment will be required at the price equivalent to the highest yield bid at which bids were accepted. The interest rate on the Notes and the price equivalent to the highest yield at which bids were accepted will be determined in the manner described below. Additional amounts of the Notes may be issued to Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued to Federal Reserve Banks as agents for foreign and international monetary authorities.

2. Description of Securities

2.1. The issue date and maturity date of the Notes are stated in the offering announcement. The Notes will accrue interest from the issue date. Interest will be payable on a semiannual basis as described in the offering announcement through the date that the principal becomes payable. The Notes will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes will be issued only in book-entry form in the minimum and

multiple amounts stated in the offering announcement. They will not be issued in registered definitive or in bearer form.

2.3. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR part 306), as to the extent applicable to marketable securities issued in book entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in Department of the Treasury Circular, Public Debt Series, No. 2-86 (31 CFR part 357), apply to the Notes offered in this circular.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and the Bureau of the Public Debt, Washington, DC 20239-1500. The closing times for the receipt of noncompetitive and competitive tenders are specified in the offering announcement. Noncompetitive tenders will be considered timely if postmarked (U.S. Postal Service cancellation date) no later than the day prior to the auction and received no later than close of business on the issue day.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is stated in the offering announcement, and larger bids must be in multiples of that amount.

3.3. Competitive bids must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. A single bidder, as defined in Treasury's single bidder guidelines contained in Attachment A to this circular, may submit bids at more than one yield. However, at any one yield, the Treasury will not recognize any amount tendered by a single bidder in excess of 35 percent of the public offering amount. A competitive bid by a single bidder at any one yield in excess of 35 percent of the public offering will be reduced to that amount.

3.4. Noncompetitive tenders do not specify a yield. A single bidder should not submit a noncompetitive tender for more than \$5,000,000. A noncompetitive bid by a single bidder in excess of \$5,000,000 will be reduced to that amount. A bidder, whether bidding directly or through a depository institution or a government securities broker/dealer, may not submit a noncompetitive bid for its own account in the same auction in which it is submitting a competitive bid for its own

account. A bidder may not submit a noncompetitive bid if the bidder holds a position, in the Notes being auctioned, in "when-issued" trading, or in futures or forward contracts. A noncompetitive bidder may not enter into any agreement to purchase or sell or otherwise dispose of the security being auctioned, nor may it commit to sell the security prior to the designated closing time for receipt of competitive bids.

3.5. The following institutions may submit tenders for accounts of customers: Depository institutions, as described in section 19(b)(1)(A), excluding those institutions described in subparagraph (vii), of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)); and government securities broker/dealers that are registered with the Securities and Exchange Commission or noticed as government securities broker/dealers pursuant to section 15C(a)(1) of the Securities Exchange Act of 1934. Others are permitted to submit tenders only for their own account. A submitter, if bidding competitively for customers, must include a customer list with the tender giving, for each customer, the name of the customer and the amount bid. A separate tender and customer list should be submitted for each competitive yield. For noncompetitive bids, the customer list must provide, for each customer, the name of the customer and the amount bid. For mailed tenders, the customer list must be submitted with the tender. For other than mailed tenders, the customer list should accompany the tender. If the customer list is not submitted with the tender, information for the list must be complete and available for review by the deadline for submission of noncompetitive tenders. The customer list should be received by the Federal Reserve Bank on auction day. All competitive and noncompetitive bids submitted on behalf of trust estates must provide, for each trust estate, the name or title of the trustee(s), a reference to the document creating the trust with the date of execution, and the employer identification number of the trust. Customer bids may not be aggregated on the customer list. The customer list must include customers and customers of those customers, where applicable.

3.6. A competitive single bidder must report its net long position if the total of all its bids for the security being offered and its net position in the security equals or exceeds \$2 billion, with the position to be determined as of one half-hour prior to the closing time for the receipt of competitive tenders. A net long position includes positions, in the security being auctioned, in "when-issued" trading, and in futures and

forward contracts. Bidders who meet this reporting requirement and are customers of a depository institution or a government securities broker/dealer must report their positions through the institution submitting the bid on their behalf.

3.7. Tenders from bidders who are making payment by charge to a funds account at a Federal Reserve Bank and tenders from bidders who have an approved autocharge agreement on file at a Federal Reserve Bank will be received without deposit. In addition, tenders from States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; and Federal Reserve Banks will be received without deposit. Tenders from all others, including tenders submitted for Notes to be maintained on the book-entry records of the Department of the Treasury, must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.8. After the deadline for receipt of competitive tenders, there will be a public announcement of the amounts of bids received and accepted, the highest yield accepted, and the interest rate on the notes. Subject to the reservations expressed in Section 4, noncompetitive bids will be accepted in full, and then competitive bids will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Bids at the highest yield at which bids were accepted will be prorated if necessary. All successful competitive bidders, regardless of the yields they each bid, will be awarded securities at the highest yield at which bids were accepted. After the determination is made as to which bids are accepted, an interest rate will generally be established, at a $\frac{1}{8}$ of one percent increment, which produces a price equivalent to the highest yield at which bids were accepted and is closest to, but not above, par. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price equivalent to the highest yield at which bids were accepted will be determined, and each noncompetitive bidder and each successful competitive bidder will be required to pay such price for their securities. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the

Treasury shall be final. If the amount of noncompetitive bids received would absorb most or all of the public offering, competitive bids would be accepted in an amount determined by the Department to be sufficient to provide a fair determination of the highest yield for the securities being auctioned. Bids received from Federal Reserve Banks for their own account or for foreign and international monetary authorities will be accepted at the price equivalent to the highest yield at which bids were accepted.

3.9. No single bidder will be awarded securities in an amount exceeding 35 percent of the public offering. The determination of the maximum award to a single bidder will take into account the bidder's net long position, if the bidder has been obliged to report its position per the requirements outlined in Section 3.6.

3.10. Notice of awards will be provided by a Federal Reserve Bank or Branch or the Bureau of the Public Debt to bidders who have submitted accepted competitive bids, whether for their own account or for the account of customers. Those submitting non-competitive bids will be notified only if the bid is not accepted in full, or when the price at the highest yield at which bids were accepted is over par. No later than 12 noon local time on the day following the auction, the appropriate Federal Reserve Bank will notify each depository institution that has entered into an autocharge agreement with a bidder as to the amount to be charged to the institution's funds account at the Federal Reserve Bank on the issue date. Any customer that is awarded \$500 million or more of securities must furnish, no later than 10 a.m. local time on the day following the auction, written confirmation of its bid to the Federal Reserve Bank or Branch where the bid was submitted. A depository institution or government securities broker/dealer submitting a bid for a customer is responsible for notifying its customer of this requirement if the customer is awarded \$500 million or more of securities as a result of bids submitted by the depository institution or government securities broker/dealer.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all bids in whole or in part, to allot more or less than the amount of Notes specified in the offering announcement, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The

Secretary's action under this Section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made timely at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted will be made by a charge to a funds account or pursuant to an approved autocharge agreement, as provided in Section 3.7. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in Section 3.7. must be made or completed on or before the issue date. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury notes or bonds maturing on or before the settlement date but which are not over-due as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors by the time stated in the offering announcement. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted may, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the Note being purchased. In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment

for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may at any time supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

6.4. Attachment A and the offering announcement are incorporated as part of this circular.

Marcus W. Page,
Acting Fiscal Assistant Secretary.

Attachment A—Treasury's Single Bidder Guidelines for Noncompetitive Bidding in All Treasury Security Auctions

The investor categories listed below define what constitutes a single noncompetitive bidder.

(1) Bank Holding Companies and Subsidiaries—

A bank holding company (includes the company and/or one or more of its subsidiaries, whether or not organized as separate entities under applicable law).

(2) Banks and Branches—

A parent bank (includes the parent and/or one or more of its branches, whether or not organized as separate entities under applicable law).

(3) Thrift Institutions and Branches—

A thrift institution, such as a savings and loan association, credit union, savings banks, or other similar entity (includes the principal or parent office and/or one or more of its branches, whether or not organized as separate entities under applicable law).

(4) Corporations and Subsidiaries—

A corporation (includes the corporation and/or one or more of its majority-owned

subsidiaries, i.e., any subsidiary more than 50 percent of whose stock is owned by the parent corporation or by any other of its majority-owned subsidiaries).

(5) Families—

A married person (includes his or her spouse, and any unmarried adult children, having a common address and/or household).

Note: A minor child, as defined by the law of domicile, is not permitted to submit tenders individually, or jointly with an adult bidder. (A minor's parent acting as natural guardian is not recognized as a separate bidder.)

(6) Partnerships—

Each partnership (includes a partnership or individual partner(s), acting together or separately, who own the majority or controlling interest in other partnerships, corporations, or associations).

(7) Guardians, Custodians, or other Fiduciaries—

A guardian, custodian, or similar fiduciary, identified by (a) the name or title of the fiduciary, (b) reference to the document, court order, or other authority under which the fiduciary is acting, and (c) the taxpayer identifying number assigned to the estate.

(8) Trusts—

A trust estate, which is identified by (a) the name or title of the trustee, (b) a reference to the document creating the trust, e.g., a trust indenture, with date of execution, or a will, (c) the IRS employer identification number (not social security account number).

(9) Political Subdivisions—

(a) A state government (any of the 50 states and the District of Columbia).

(b) A unit of local government (any county, city, municipality, or township, or other unit of general government, as defined by the Bureau of the Census for statistical purposes, and includes any trust, investment, or other funds thereof).

(c) A commonwealth, territory, or possession.

(10) Mutual Funds—

A mutual fund (includes all funds that comprise it, whether or not separately administered).

(11) Money Market Funds—

A money market fund (includes all funds that have a common management).

(12) Investment Agents/Money Managers—

An individual, firm, or association that undertakes to service, invest, and/or manage funds for others.

(13) Pension Funds—

A pension fund (includes all funds that comprise it, whether or not separately administered).

Notes: The definitions do not reflect all bidder situations. "Single bidder" is not necessarily synonymous with "single entity".

Questions concerning the guidelines should be directed to the Office of Financing, Bureau of the Public Debt, Washington, DC 20239 (telephone 202/219-3350).

Auction of 2-Year and 5-Year Notes Totaling \$26,750 Million

The Treasury will auction \$15,500 million of 2-year notes and \$11,250 million of 5-year notes to refund \$20,954 million of securities maturing December 31, 1992, and to raise about \$5,800 million new cash. The \$20,954 million of maturing securities are those held by the public, including \$1,331 million currently held by Federal Reserve Banks as agents for foreign and international monetary authorities.

Both the 2-year and 5-year note auctions will be conducted in the single-price auction format. All competitive and noncompetitive awards will be at the highest yield of accepted competitive tenders.

The \$26,750 million is being offered to the public, and any amounts tendered by Federal Reserve Banks as agents for foreign and international monetary authorities will be added to that amount.

In addition to the public holdings, Federal Reserve Banks, for their own accounts, hold \$1,570 million of the maturing securities that may be refunded by issuing additional amounts of the new securities.

Details about each of the new securities are given in the attached highlights of the offerings and in the official offering circulars. Attachment

HIGHLIGHTS OF TREASURY OFFERINGS TO THE PUBLIC OF 2-YEAR AND 5-YEAR NOTES TO BE ISSUED DECEMBER 31, 1992

[December 16, 1992]

Amount Offered to the Public	\$15,500 million	\$11,250 million.
Description of Security:		
Term and type of security	2-year notes	5-year notes.
Series and CUSIP designation	Series AH-1994 (CUSIP NO. 912827 H9 6)	Series U-1997 (CUSIP No. 912827 J2 9).
Maturity date	December 31, 1994	December 31, 1997.
Interest rate	To be determined based on the highest accepted bid	To be determined based on the highest accepted bid.
Investment yield	To be determined at auction	To be determined at auction.
Premium or discount	To be determined at auction	To be determined at auction.
Interest payment dates	June 30 and December 31	June 30 and December 31.
Minimum denomination available	\$5,000	\$1,000.
Terms of Sale:		
Method of sale	Yield auction	Yield auction.
Competitive tenders	Must be expressed as an annual yield, with two decimals, e.g., 7.10%.	Must be expressed as an annual yield, with two decimals, e.g., 7.10%.
Noncompetitive tenders	Accepted in full up to \$5,000	Accepted in full up to \$5,000.
Accrued interest payable by investor	None	None.
Key Dates:		
Receipt of tenders	Tuesday, December 22, 1992	Wednesday, December 23, 1992.
(a) noncompetitive	Prior to 12 noon, EST	Prior to 12 noon, EST.
(b) competitive	Prior to 1 p.m., EST	Prior to 1 p.m., EST.

HIGHLIGHTS OF TREASURY OFFERINGS TO THE PUBLIC OF 2-YEAR AND 5-YEAR NOTES TO BE ISSUED DECEMBER 31, 1992—Continued

[December 16, 1992]

Settlement (final payment due from institutions): (a) funds immediately available to the Treasury. (b) readily collectible check	Thursday, December 31, 1992	Thursday, December 31, 1992.
	Tuesday, December 29, 1992	Tuesday, December 29, 1992.

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BILLING CODE 4810-40-M

[Department Circular—Public Debt Series—No. 41-92]

Treasury Notes of December 31, 1997, Series U-1997 (CUSIP No. 912827 J2 9)

Washington, December 16, 1992.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of chapter 31 of title 31, United States Code, invites tenders for United States securities, as described above and in the offering announcement, hereafter referred to as Notes. The Notes will be sold at auction, and bidding will be on a yield basis. Payment will be required at the price equivalent to the highest yield bid at which bids were accepted. The interest rate on the Notes and the price equivalent to the highest yield at which bids were accepted will be determined in the manner described below. Additional amounts of the Notes may be issued to Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued to Federal Reserve Banks as agents for foreign and international monetary authorities.

2. Description of Securities

2.1. The issue date and maturity date of the Notes are stated in the offering announcement. The Notes will accrue interest from the issue date. Interest will be payable on a semiannual basis as described in the offering announcement through the date that the principal becomes payable. The Notes will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes will be issued only in book-entry form in the minimum and multiple amounts stated in the offering announcement. They will not be issued in registered definitive or in bearer form.

2.3. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in Department of the Treasury Circular, Public Debt Series, No. 2-86 (31 CFR part 357), apply to the Notes offered in this circular.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239-1500. The closing times for the receipt of noncompetitive and competitive tenders are specified in the offering announcement. Noncompetitive tenders will be considered timely if postmarked (U.S. Postal Service cancellation date) no later than the day prior to the auction and received no later than close of business on the issue day.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is stated in the offering announcement, and larger bids must be in multiples of that amount.

3.3. Competitive bids must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. A single bidder, as defined in Treasury's single bidder guidelines contained in Attachment A to this circular, may submit bids at more than one yield. However, at any one yield, the Treasury will not recognize any amount tendered by a single bidder in excess of 35 percent of the public offering amount. A competitive bid by a single bidder at any one yield in excess of 35 percent of the public offering will be reduced to that amount.

3.4. Noncompetitive tenders do not specify a yield. A single bidder should not submit a noncompetitive tender for more than \$5,000,000. A noncompetitive bid by a single bidder in excess of \$5,000,000 will be reduced to that amount. A bidder, whether bidding

directly or through a depository institution or a government securities broker/dealer, may not submit a noncompetitive bid for its own account in the same auction in which it is submitting a competitive bid for its own account. A bidder may not submit a noncompetitive bid if the bidder holds a position, in the Notes being auctioned, in "when-issued" trading, or in futures or forward contracts. A noncompetitive bidder may not enter into any agreement to purchase or otherwise dispose of the security being auctioned, nor may it commit to sell the security prior to the designated closing time for receipt of competitive bids.

3.5. The following institutions may submit tenders for accounts of customers: Depository institutions, as described in section 19(b)(1)(A), excluding those institutions described in subparagraph (vii), of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)); and government securities broker/dealers that are registered with the Securities and Exchange Commission or noticed as government securities broker/dealers pursuant to section 15C(a)(1) of the Securities Exchange Act of 1934. Others are permitted to submit tenders only for their own account. A submitter, if bidding competitively for customers, must include a customer list with the tender giving, for each customer, the name of the customer and the amount bid. A separate tender and customer list should be submitted for each competitive yield. For noncompetitive bids, the customer list must provide, for each customer, the name of the customer and the amount bid. For mailed tenders, the customer list must be submitted with the tender. For other than mailed tenders, the customer list should accompany the tender. If the customer list is not submitted with the tender, information for the list must be complete and available for review by the deadline for submission of noncompetitive tenders. The customer list should be received by the Federal Reserve Bank on auction day. All competitive and noncompetitive bids submitted on behalf of trust estates must provide, for each trust estate, the name or title of the trustee(s), and reference to the document creating the trust with the date of execution, and the employer

identification number of the trust. Customer bids may not be aggregated on the customer list. The customer list must include customers and customers of those customers, where applicable.

3.6. A competitive single bidder must report its net long position if the total of all its bids for the security being offered and its net position in the security equals or exceeds \$2 billion, with the position to be determined as of one half-hour prior to the closing time for the receipt of competitive tenders. A net long position includes positions, in the security being auctioned, in "when-issued" trading, and in futures and forward contracts. Bidders who meet this reporting requirement and are customers of a depository institution or a government securities broker/dealer must report their positions through the institution submitting the bid on their behalf.

3.7. Tenders from bidders who are making payment by charge to a funds account at a Federal Reserve Bank and tenders from bidders who have an approved autocharge agreement on file at a Federal Reserve Bank will be received without deposit. In addition, tenders from States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; and Federal Reserve Banks will be received without deposit. Tenders from all others, including tenders submitted for Notes to be maintained on the book-entry records of the Department of the Treasury, must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.8. After the deadline for receipt of competitive tenders, there will be a public announcement of the amounts of bids received and accepted, the highest yield accepted, and the interest rate on the notes. Subject to the reservations expressed in Section 4, noncompetitive bids will be accepted in full, and then competitive bids will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Bids at the highest yield at which bids were accepted will be prorated if necessary. All successful competitive bidders, regardless of the yields they each bid, will be awarded securities at the highest yield at which bids were accepted. After the determination is made as to which bids are accepted, an interest rate will generally be established, at a $\frac{1}{8}$ of one

percent increment, which produces a price equivalent to the highest yield at which bids were accepted and is closest to, but not above, par. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price equivalent to the highest yield at which bids were accepted will be determined, and each noncompetitive bidder and each successful competitive bidder will be required to pay such price for their securities. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive bids received would absorb most or all of the public offering, competitive bids would be accepted in an amount determined by the Department to be sufficient to provide a fair determination of the highest yield for the securities being auctioned. Bids received from Federal Reserve Banks for their own account or for foreign and international monetary authorities will be accepted at the price equivalent to the highest yield at which bids were accepted.

3.9. No single bidder will be awarded securities in an amount exceeding 35 percent of the public offering. The determination of the maximum award to a single bidder will take into account the bidder's net long position, if the bidder has been obliged to report its position per the requirements outlined in Section 3.6.

3.10. Notice of awards will be provided by a Federal Reserve Bank or Branch or the Bureau of the Public Debt to bidders who have submitted accepted competitive bids, whether for their own account or for the account of customers. Those submitting non-competitive bids will be notified only if the bid is not accepted in full, or when the price at the highest yield at which bids were accepted is over par. No later than 12:00 noon local time on the day following the auction, the appropriate Federal Reserve Bank will notify each depository institution that has entered into an autocharge agreement with a bidder as to the amount to be charged to the institution's funds account at the Federal Reserve Bank on the issue date. Any customer that is awarded \$500 million or more of securities must furnish, no later than 10 a.m. local time on the day following the auction, written confirmation of its bid to the Federal Reserve Bank or Branch where the bid was submitted. A depository institution or government securities broker/dealer submitting a bid for a customer is responsible for notifying its customer of this requirement if the

customer is awarded \$500 million or more of securities as a result of bids submitted by the depository institution or government securities broker/dealer.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all bids in whole or in part, to allot more or less than the amount of Notes specified in the offering announcement, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made timely at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted will be made by a charge to a funds account or pursuant to an approved autocharge agreement, as provided in Section 3.7. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in Section 3.7, must be made or completed on or before the issue date. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury notes or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors by the time stated in the offering announcement. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted may, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the Note being purchased.

In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may at any time supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

6.4. Attachment A and the offering announcement are incorporated as part of this circular.

Marcus W. Page,
Acting Fiscal Assistant Secretary.

Attachment A—Treasury's Single Bidder Guidelines for Noncompetitive Bidding in All Treasury Security Auctions

The investor categories listed below define what constitutes a single noncompetitive bidder.

(1) *Bank Holding Companies and Subsidiaries*—A bank holding company (includes the company and/or one or more of its subsidiaries, whether or not organized as separate entities under applicable law).

(2) *Banks and Branches*—A parent bank (includes the parent and/or one or more of its branches, whether or not organized as separate entities under applicable law).

(3) *Thrift Institutions and Branches*—A thrift institution, such as a savings and loan association, credit union, savings banks, or other similar entity (includes the principal or parent office and/or one or more of its branches, whether or not organized as separate entities under applicable law).

(4) *Corporations and Subsidiaries*—A corporation (includes the corporation and/or one or more of its majority-owned subsidiaries, i.e., any subsidiary more than 50 percent of whose stock is owned by the parent corporation or by any other of its majority-owned subsidiaries).

(5) *Families*—A married person (includes his or her spouse, and any unmarried adult children, having a common address and/or household).

Note: A minor child, as defined by the law of domicile, is *not* permitted to submit tenders individually, or jointly with an adult bidder. (A minor's parent acting as natural guardian is *not* recognized as a separate bidder.)

(6) *Partnerships*—Each partnership (includes a partnership or individual partner(s), acting together or separately, who own the majority or controlling interest in other partnerships, corporations, or associations).

(7) *Guardians, Custodians, or other Fiduciaries*—A guardian, custodian, or similar fiduciary, identified by (a) the name or title of the fiduciary, (b) reference to the document, court order, or other authority under which the fiduciary is acting, and (c) the taxpayer identifying number assigned to the estate.

(8) *Trusts*—A trust estate, which is identified by (a) the name or title of the trustee, (b) a reference to the document creating the trust, e.g., a trust indenture, with date of execution, or a will, (c) the IRS employer identification number (not social security account number).

(9) *Political Subdivisions*—(a) A state government (any of the 50 states and the District of Columbia).

(b) A unit of local government (any county, city, municipality, or township, or other unit of general government, as defined by the Bureau of the Census for statistical purposes, and includes any trust, investment, or other funds thereof).

(c) A commonwealth, territory, or possession.

(10) *Mutual Funds*—A mutual fund (includes all funds that comprise it, whether or not separately administered).

(11) *Money Market Funds*—A money market fund (includes all funds that have a common management).

(12) *Investment Agents/Money Managers*—An individual, firm, or association that undertakes to service, invest, and/or manage funds for others.

(13) *Pension Funds*—A pension fund (includes all funds that comprise it, whether or not separately administered).

Notes: The definitions do not reflect all bidder situations. "Single bidder" is not necessarily synonymous with "single entity".

Questions concerning the guidelines should be directed to the Office of Financing, Bureau of the Public Debt, Washington, DC 20239 (telephone 202/219-3350).

Auction of 2-Year and 5-Year Notes Totaling \$26,750 Million

The Treasury will auction \$15,500 million of 2-year notes and \$11,250 million of 5-year notes to refund \$20,954 million of securities maturing December 31, 1992, and to raise about \$5,800 million new cash. The \$20,954 million of maturing securities are those held by the public, including \$1,331 million currently held by Federal Reserve Banks as agents for foreign and international monetary authorities.

Both the 2-year and 5-year note auctions will be conducted in the single-price auction format. All competitive and non-competitive awards will be at the highest yield of accepted competitive tenders.

The \$26,750 million is being offered to the public, and any amounts tendered by Federal Reserve Banks as agents for foreign and international monetary authorities will be added to that amount.

In addition to the public holdings, Federal Reserve Banks, for their own accounts, hold \$1,570 million of the maturing securities that may be refunded by issuing additional amounts of the new securities.

Details about each of the new securities are given in the attached highlights of the offerings and in the official offering circulars. Attachment

HIGHLIGHTS OF TREASURY OFFERINGS TO THE PUBLIC OF 2-YEAR AND 5-YEAR NOTES TO BE ISSUED DECEMBER 31, 1992

[December 16, 1992]

Amount offered to the public	\$15,500 million	\$11,250 million.
Description of Security:		
Term and type of security	2-year notes	5-year notes.
Series and CUSIP designation	Series AH-1994 (CUSIP No. 912827 H9 6) ...	Series U-1997, CUSIP No. 912827 J2 9).
Maturity date	December 31, 1994	December 31, 1997.
Interest rate	To be determined based on the highest accepted bid.	To be determined based on the highest accepted bid.
Investment yield	To be determined at auction	To be determined at auction.
Premium or discount	To be determined after auction	To be determined after auction.
Interest payment dates	June 30 and December 31	June 30 and December 31.
Minimum denomination available	\$5,000	\$1,000.
Terms of Sale:		
Method of sale	Yield auction	Yield auction.
Competitive tenders	Must be expressed as an annual yield, with two decimals, e.g., 7.10%.	Must be expressed as an annual yield, with two decimals, e.g., 7.10%.
Noncompetitive tenders	Accepted in full up to \$5,000,000	Accepted in full up to \$5,000,000.
Accrued interest payable by investor	None	None.

HIGHLIGHTS OF TREASURY OFFERINGS TO THE PUBLIC OF 2-YEAR AND 5-YEAR NOTES TO BE ISSUED DECEMBER 31, 1992—Continued
[December 16, 1992]

Key Dates		
Receipt of tenders	Tuesday, December 22, 1992	Wednesday, December 23, 1992.
(a) noncompetitive	Prior to 12 noon, EST	Prior to 12 noon, EST.
(b) competitive	Prior to 1 p.m., EST	Prior to 1 p.m., EST.
Settlement (final payment due from institutions):		
(a) funds immediately available to the Treasury	Thursday, December 31, 1992	Thursday, December 31, 1992.
(b) readily-collectible check	Tuesday, December 29, 1992	Tuesday, December 29, 1992.

[FR Doc. 92-30973 Filed 12-17-92; 12:32 pm]

BILLING CODE 4810-40-M

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collections and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, Room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice.

Dated: December 15, 1992.
By direction of the Secretary.

Frank E. Lalley,
Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.

New Collection

1. Application for Supplemental Service Disabled Veterans (RH) Life Insurance, VA Forms 29-0188, 29-0189, and 29-0190.
2. The forms are used by veterans to apply for Supplemental Service Disabled Veterans Insurance. The information is used to establish eligibility for coverage.
3. Individuals or households.
4. 3,333 hours.
5. 20 minutes.
6. On occasion.
7. 10,000 respondents.

Extension

1. Electrical Systems Inspection Report (Manufactured Home), VA Form 26-8731b.
2. The form is completed by inspectors to record findings for electrical systems of used manufactured homes proposed as security for guaranteed loans. The information is used to determine acceptability of units for VA financing.
3. Individuals or households; businesses or other for-profit; small businesses or organizations.
4. 240 hours.
5. 2 hours.
6. On occasion.
7. 120 respondents.

Extension

1. Court Appointed Fiduciary's Account, VA Form 27-4706c.
2. This form is used by VA Fiduciary and Field Examination Program to provide the court appointed fiduciary of a VA beneficiary an acceptable format for providing accountings to the appointing court. The information will be used to determine whether VA benefits have been properly managed.
3. Individuals or households; State or local governments; Federal agencies or employees; non-profit institutions.
4. 1,968 hours.
5. 30 minutes.
6. On occasion.
7. 3,936 respondents.

Extension

1. Financial Statement, VA Form 26-6807.
2. This form is used to determine the financial condition of original veteran obligors for release from personal liability arising from original guaranty of their home loans or the making of a direct loan; to determine a borrower's financial condition in connection with efforts to reinstate a seriously defaulted guaranteed, insured, or portfolio loan; and to determine the eligibility of homeowners for aid under the Homeowners Assistance Program.
3. 30,000 hours.
4. 45 minutes.
5. On occasion.
6. Individuals or households.
7. 40,000 respondents.

[FR Doc. 92-30969 Filed 12-21-92; 8:45 am]
BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register

Vol. 57, No. 246

Tuesday, December 22, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of December 21, 28, 1992 and January 4, and 11, 1993.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of December 21

Monday, December 21

10:00 a.m.

Briefing on Waste Management—
International Safety Convention
(Closed—Ex. 9)

11:00 a.m.

Affirmation/Discussion and Vote (Public Meeting)

1:00 p.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

2:00 p.m.

Briefing on Status of General Atomic-Sequoyah Fuels Facility (Public Meeting)
(Contact: Richard Cunningham, 301-504-3426)

Tuesday, December 22

2:30 p.m.

Briefing on Status of U.S. Nuclear Initiatives with Russia and Ukraine
(Closed—Ex. 1)

Week of December 28—Tentative

Tuesday, December 29

11:30 a.m.

Affirmation/ Discussion and Vote (Public Meeting) (if needed)

Week of January 4—Tentative

Tuesday, January 5

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of January 11—Tentative

Monday, January 11

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To Verify the Status of Meeting Call (Recording)—(301) 504-1292.

CONTACT PERSON FOR MORE INFORMATION:
William Hill (301) 504-1661.

Dated: December 18, 1992.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 92-31182 Filed 12-18-92; 3:19 pm]

BILLING CODE 7590-01-M

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

Notice of Vote to Close Meeting

By telephone vote on December 15, 1992, a majority of the members contacted and voting, the Board of Governors voted to close to public observation a meeting held in Washington, DC, to consider possible actions to take in Docket 91-1073 before the United States Court of Appeals for the District of Columbia Circuit.

The meeting was attended by the following persons: Governors Alvarado, Daniels, del Junco, Griesemer, Mackie, Pace, Setrakian and Winters; Postmaster General Runyon; Deputy Postmaster General Coughlin; Secretary for the Board Harris; and General Counsel Elcano.

The Board determined that prior public notice was not possible and pursuant to section 552b(c)(10) of title 5, United States Code, and section 7.3(j) of title 39, Code of Federal Regulations, the discussion of this matter was exempt from the open meeting requirement of the Government in the Sunshine Act [5 U.S.C. 552b(b)].

The Board further determined that the public interest did not require that the Board's discussion of the matter be open to the public.

In accordance with section 552b(f)(1) of title 5, United States Code, and section 7.6(a) of title 39, Code of Federal Regulations, the General Counsel of the United States Postal Service has certified that in her opinion the meeting may properly be closed to public observation, pursuant to section 552b(c)(10) of title 5, United States Code; and section 7.3(j) of title 39, Code of Federal Regulations.

Requests for information about the meeting should be addressed to the Secretary for the Board, David F. Harris, at (202) 268-4800.

David F. Harris,

Secretary.

[FR Doc. 92-31095 Filed 12-18-92; 11:38 am]

BILLING CODE 7710-12-M

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

§ 301.6621-3 [Corrected]

1. On page 53556, in the first column, in § 301.6621-3(d), *Example 3(i)*, in the ninth line from the bottom, "90-days" should read "90-day".

2. On the same page, in the third column, in § 301.6621-3(d), *Example 5(ii)*, in the third line from the bottom, insert "Y" after "that".

BILLING CODE 1505-01-0

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1**

[IA-5-92]

RIN 1545-AQ50

Carryover of Passive Activity Losses and Credits and At Risk Losses to Bankruptcy Estates of Individuals*Correction*

In proposed rule document 92-26677 beginning on page 53300 in the issue of Monday, November 9, 1992, make the following corrections:

1. On page 53301, in the first column, under **SUPPLEMENTARY INFORMATION**, in the third full paragraph, in the last line, "response" should read "responses".

§ 1.1398-2 [Corrected]

2. On page 53303, in the third column, in § 1.1398-2(d)(2), in the first line "456" should read "465"; and in paragraph (f)(2)(i), in the second line from the bottom, "of" should read "for".

3. On page 53304, in the first column, in § 1.1398-2(f)(2)(i), in the first line, "esta e's" should read "estate's".

BILLING CODE 1505-01-0

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 301**

[T.D. 8447]

RIN 1545-AP27

**Determination of Rate of Interest—
Increase in Rate of Interest Payable on
Large Corporate Underpayments***Correction*

In rule document 92-27145 beginning on page 53550 in the issue of Thursday, November 12, 1992, make the following corrections:

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 131**

[WH-FRL-4543-9]

Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rule promulgates for 14 States, the chemical-specific, numeric criteria for priority toxic pollutants necessary to bring all States into compliance with the requirements of section 303(c)(2)(B) of the Clean Water Act (CWA). States determined by EPA to fully comply with section 303(c)(2)(B) requirements are not affected by this rule.

The rule addresses two situations. For a few States, EPA is promulgating a limited number of criteria which were previously identified as necessary in disapproval letters to such States, and which the State has failed to address. For other States, Federal criteria are necessary for all priority toxic pollutants for which EPA has issued section 304(a) water quality criteria guidance and that are not the subject of approved State criteria.

When these standards take effect, they will be the legally enforceable standards in the named States for all purposes and programs under the Clean Water Act, including planning, monitoring, NPDES permitting, enforcement and compliance.

EPA is also withdrawing today the human health criteria published in the 1980 Ambient Water Quality Criteria documents for: Beryllium, Cadmium, Chromium, Lead, Methyl Chloride, Selenium, Silver, and 1,1,1 Trichloroethane. A summary of the criteria recommendation and the notice of availability of each criteria document were published at 45 FR 79318, November 28, 1980.

EFFECTIVE DATE: This rule shall be effective February 5, 1993.

ADDRESSES: The public may inspect the administrative record for this rulemaking, including documentation supporting the aquatic life and human health criteria, and all public comments received on the proposed rule at the Environmental Protection Agency, Standards and Applied Science Division, Office of Science and Technology, room 919 East Tower, Waterside Mall, 401 M Street, SW.,

Washington, DC 20460 (Telephone: 202-260-1315) on weekdays during the Agency's normal business hours of 8 a.m. to 4:30 p.m. A reasonable fee will be charged for photocopies. Inquiries can be made by calling 202-260-1315.

FOR FURTHER INFORMATION CONTACT: David K. Sabock or R. Kent Ballentine, Telephone 202-260-1315.

SUPPLEMENTARY INFORMATION:

This preamble is organized according to the following outline:

- A. Introduction and Overview
 - 1. Introduction
 - 2. Overview
- B. Statutory and Regulatory Background
 - 1. Pre-Water Quality Act Amendments of 1987 (Pub. L. 100-4)
 - 2. The Water Quality Act Amendments of 1987 (Pub. L. 100-4)
 - a. Description of the New Requirements
 - b. EPA's Initial Implementing Actions for sections 303(c) and 304(l)
 - 3. EPA's Program Guidance for section 303(c)(2)(B)
- C. State Actions Pursuant to section 303(c)(2)(B)
- D. Determining State Compliance with section 303(c)(2)(B)
 - 1. EPA's Review of State Water Quality Standards for Toxics
 - 2. Determining Current Compliance Status
- E. Rationale and Approach For Developing the Final Rule
 - 1. Legal Basis
 - 2. Approach for Developing the Final Rule
 - 3. Approach for States that Fully Comply Subsequent to Issuance of this Final Rule
- F. Derivation of Criteria
 - 1. Section 304(a) Criteria Process
 - 2. Aquatic Life Criteria
 - 3. Criteria for Human Health
 - 4. Section 304(a) Human Health Criteria Excluded
 - 5. Cancer Risk Level
 - 6. Applying EPA's Nationally Derived Criteria to State Waters
 - 7. Application of Metals Criteria
- G. Description of the Final Rule and Changes from Proposal
 - 1. Changes from Proposal
 - 2. Scope
 - 3. EPA Criteria for Priority Toxic Pollutants
 - 4. Applicability
- H. (Reserved)
- I. Response to Public Comments
 - 1. Legal Authority
 - 2. Science
 - 3. Economics
 - 4. Implementation
 - 5. Timing and Process
 - 6. State Issues
- J. Executive Order 12291
- K. Regulatory Flexibility Act
- L. Paperwork Reduction Act

A. Introduction and Overview**1. Introduction**

This section of the Preamble introduces the topics which are addressed subsequently and provides a brief overview of EPA's basis and

rationale for promulgating Federal criteria for priority toxic pollutants. Section B of this Preamble presents a description of the evolution of the Federal Government's efforts to control toxic pollutants beginning with a discussion of the authorities in the Federal Water Pollution Control Act Amendments of 1972. Also described in some detail is the development of the water quality standards review and revision process which provides for establishing both narrative goals and enforceable numeric requirements for controlling toxic pollutants. This discussion includes the changes enacted in the 1987 Clean Water Act Amendments which are the basis for this rule. Section C summarizes State efforts since 1987 to comply with the requirements of section 303(c)(2)(B). Section D describes EPA's procedure for determining whether a State has fully complied with section 303(c)(2)(B). Section E sets out the rationale and approach for developing the final rule, including a discussion of EPA's legal basis. Section F describes the development of the criteria included in this rule. Section G summarizes the provisions of the final rule. (Section H is reserved.) Section I contains the response to major public comments received on the proposal. Sections J, K, and L address the requirements of Executive Order 12291, the Regulatory Flexibility Act, and the Paperwork Reduction Act, respectively. Section M provides a list of subjects covered in this rule.

A public hearing on the proposed rule was held on December 19, 1991, in Washington, DC. A total of 26 non-EPA people registered at the hearing. The public comment period closed on December 19, 1991. EPA received a total of 153 written comments on the proposed rule.

2. Overview

This rule, which establishes Federal criteria for certain priority toxic pollutants in a number of States, is important for several environmental, programmatic and legal reasons.

First, control of toxic pollutants in surface waters is an important priority to achieve the Clean Water Act's goals and objectives. The most recent National Water Quality Inventory indicates that one-third of monitored river miles, lake acres, and coastal waters have elevated levels of toxics. Forty-seven States and Territories have reported elevated levels of toxic pollutants in fish tissues. States have issued a total of 586 fishing advisories and 135 bans, attributed mostly to industrial discharges and land disposal.

The absence of State water quality standards for toxic pollutants undermines State and EPA toxic control efforts to address these problems. Without clearly established water quality goals, the effectiveness of many of EPA's water programs is jeopardized. Permitting, enforcement, coastal water quality improvement, fish tissue quality protection, certain nonpoint source controls, drinking water quality protection, and ecological protection all depend to a significant extent on complete and adequate water quality standards. Numeric criteria for toxics are essential to the process of controlling toxics because they allow States and EPA to evaluate the adequacy of existing and potential control measures to protect aquatic ecosystems and human health. Formally adopted standards are the legal basis for including water quality-based effluent limitations in NPDES permits to control toxic pollutant discharges. The critical importance of controlling toxic pollutants has been recognized by Congress and is reflected, in part, by the addition of section 303(c)(2)(B) to the Act. Congressional impatience with the pace of State toxics control programs is well documented in the legislative history of the 1987 CWA amendments. In order to protect human health, aquatic ecosystems, and successfully implement toxics controls, EPA believes that all actions which are available to the Agency must be taken to ensure that all necessary numeric criteria for priority toxic pollutants are established in a timely manner.

Second, as States and EPA continue the transition from an era of primarily technology-based controls to an era in which technology-based controls are integrated with water quality-based controls, it is important that EPA ensures timely compliance with CWA requirements. An active Federal role is essential to assist States in getting in place complete toxics criteria as part of their pollution control programs. While most States recognize the need for enforceable water quality standards for toxic pollutants, their recent adoption efforts have often been stymied by a variety of factors including limited resources, competing environmental priorities, and difficult scientific, policy and legal challenges. Most water quality criteria for toxic pollutants have been available since 1980. Section 303 of the CWA requires States to review, revise, and adopt updated water quality standards every three years as part of a continuing triennial review process. The water quality standards regulation has required State adoption of numeric

criteria for toxic pollutants since 1983 (see 40 CFR 131.11). Despite the availability of scientific guidance documents and clear statutory and regulatory requirements, a preliminary assessment of the water quality standards for all States in February of 1990 showed that only six States had established fully acceptable criteria for toxic pollutants. This rate of toxics criteria adoption is contrary to the CWA requirements and is a reflection of the difficulties faced by States. In such circumstances, it is EPA's responsibility to exercise its CWA authorities to move forward the toxic control program in concert with the statutory scheme.

EPA's action will also help restore equity among the States. The CWA is designed to ensure all waters are sufficiently clean to protect public health and the environment. The CWA allows some flexibility and differences among States in their adopted and approved water quality standards, but it was not designed to reward inaction and inability to meet statutory requirements.

Although most States have made important progress toward satisfying CWA requirements, some have still failed to fully comply with section 303(c)(2)(B). The CWA authorizes EPA to promulgate standards where necessary to meet the requirements of the Act. Where States have not satisfied the CWA requirement to adopt water quality standards for toxic pollutants, which was reemphasized by Congress in 1987, it is imperative that EPA take action.

EPA's ability to oversee State standards-setting activities and to correct deficiencies in State water quality standards is critical to the effective implementation of section 303(c)(2)(B). This rule is a necessary and important component of EPA's implementation of section 303(c)(2)(B) as well as EPA's overall efforts to control toxic pollutants in surface waters.

On February 26, 1992, EPA's Deputy Administrator issued "Guidance on Risk Characterization for Risk Managers and Risk Assessors" which addresses a problem that affects public perception regarding the reliability of EPA's scientific assessments and related regulatory decisions. The guidance noted that "when risk information is presented to the * * * public, the results have been boiled down to a point estimate of risk * * * which do not fully convey the range of information considered and used in developing the assessment." The guidance lays out principles and implementation procedures to address risk assessments in future EPA presentations, reports and

decision packages. The guidance specifically notes, "However, we do not expect risk assessment documents that are close to completion to be rewritten."

The proposal for this final rule was published in November, 1991, three months prior to the risk assessment guidance being issued. Since the Agency was striving to meet a mid-February statutory deadline for final publication, when the risk guidance was issued the rulemaking package was essentially complete. The specifics of the aquatic life and human health guidelines are discussed in the preamble and in the response to public comments. The actual methodology and criteria documents describe in detail the risk assessment process involved in deriving a water quality criteria and the water quality standards contained in this rule and the resulting risk characterization. The water quality criteria methodology and individual criteria documents are part of the record for this rule. Therefore, while all the specifics of the new risk characterization guidance were not followed in this preamble, the spirit of the guidance is reflected.

Moreover, EPA has initiated a review and update of these criteria methodologies. These updates will be conducted in conformance with the risk characterization guidance and include public involvement and review.

B. Statutory and Regulatory Background

1. Pre-Water Quality Act Amendments of 1987 (Pub. L. 100-4)

Section 303(c) of the 1972 Federal Water Pollution Control Act Amendments (FWPCA) (33 U.S.C. 1313(c)) established the statutory basis for the current water quality standards program. It completed the transition from the previously established program of water quality standards for interstate waters to one requiring standards for all surface waters of the United States.

Although the major innovation of the 1972 FWPCA was technology-based controls, Congress maintained the concept of water quality standards both as a mechanism to establish goals for the Nation's waters and as a regulatory requirement when standardized technology controls for point source discharges and/or nonpoint source controls were inadequate. In recent years, these so-called water quality-based controls have received new emphasis by Congress and EPA in the continuing quest to enhance and maintain water quality to protect the public health and welfare.

Briefly stated, the key elements of section 303(c) are:

(a) A water quality standard is defined as the designated beneficial uses of a water segment and the water quality criteria necessary to support those uses;

(b) The minimum beneficial uses to be considered by States in establishing water quality standards are specified as public water supplies, propagation of fish and wildlife, recreation, agricultural uses, industrial uses and navigation;

(c) A requirement that State standards must protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act;

(d) A requirement that States must review their standards at least once each three year period using a process that includes public participation;

(e) The process for EPA review of State standards which may ultimately result in the promulgation of a superseding Federal rule in cases where a State's standards are not consistent with the applicable requirements of the CWA, or in situations where the Agency determines Federal standards are necessary to meet the requirements of the Act.

Another major innovation in the 1972 FWPCA was the establishment of the National Pollutant Discharge Elimination System (NPDES) which requires point source discharges to obtain a permit before legally discharging to the waters of the United States. In addition to the permit limits established on the basis of technology (e.g. effluent limitations guidelines), the Act requires discharges to meet instream water quality standards. (See section 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C)).

The water quality standards serve a dual function under the Clean Water Act regulatory scheme. Standards establish narrative and numeric definitions and quantification of the Act's goals and policies (see section 101, 33 U.S.C. 1251) which provide a basis for identifying impaired waters. Water quality standards also establish regulatory requirements which are translated into specific discharge requirements. In order to fulfill this critical function, adopted State criteria must contain sufficient parametric coverage to protect both human health and aquatic life.

In its initial efforts to control toxic pollutants, the FWPCA, pursuant to section 307, required EPA to designate a list of toxic pollutants and to establish toxic pollutant effluent standards based on a formal rulemaking record. Such rulemaking required formal hearings, including cross-examination of witnesses. EPA struggled with this unwieldy process and ultimately

promulgated effluent standards for six toxic pollutants, pollutant families or mixtures. (See 40 CFR part 129.)

Congress amended section 307 in the 1977 Clean Water Act Amendments by endorsing the Agency's alternative procedure of regulating toxic pollutants by use of effluent limitations guidelines, by amending the procedure for establishing toxic pollutant effluent standards to provide for more flexibility in the hearing process for establishing a record, and by directing the Agency to include sixty-five specific pollutants or classes of pollutants on the toxic pollutant list. EPA published the required list on January 31, 1978 (43 FR 4109). This toxic pollutant list was the basis on which EPA's efforts on criteria development for toxics was focused.

During planning efforts to develop effluent limitations guidelines and water quality criteria, the list of sixty-five toxic pollutants was judged too broad as some of the pollutants were, in fact, general families or classes of organic compounds consisting of many individual chemicals. EPA selected key chemicals of concern within the 65 families of pollutants and identified a more specific list of 129 priority toxic pollutants. Two volatile chemicals and one water unstable chemical were removed from the list (see 46 FR 2266, January 8, 1981; 46 FR 10723, February 4, 1981) so that at present there are 126 priority toxic pollutants. This list is published as appendix A to 40 CFR part 423.

Another critical section of the 1972 FWPCA was section 304(a) (33 U.S.C. 1314(a)). Section 304(a)(1) provides, in pertinent part, that EPA

* * * shall develop and publish * * * criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, * * * and (C) on the effects of pollutants on biological community diversity, productivity, and stability, * * *

In order to avoid confusion, it must be recognized that the Clean Water Act uses the term "criteria" in two separate ways. In section 303(c), which is discussed above, the term is part of the definition of a water quality standard. That is, a water quality standard is comprised of designated uses and the criteria necessary to protect those uses. Thus, States are required to adopt regulations or statutes which contain legally achievable criteria. However, in section 304(a), the term criteria is used in a scientific sense and EPA develops

recommendations which States consider in adopting regulatory criteria.

In response to this legislative mandate and an earlier similar statutory requirement, EPA and a predecessor agency have produced a series of scientific water quality criteria guidance documents. Early Federal efforts were Water Quality Criteria (1968 "Green Book") and Quality Criteria for Water (1976 "Red Book"). EPA also sponsored a contract effort with the National Academy of Science—National Academy of Engineering which resulted in Water Quality Criteria, 1972 (1973 "Blue Book"). These early efforts were premised on the use of literature reviews and the collective scientific judgment of Agency and advisory panels. However, when faced with the list of 65 toxic pollutants and the need to develop criteria for human health as well as aquatic life, the Agency determined that new procedures were necessary. Continued reliance solely on existing scientific literature was deemed inadequate, since for many pollutants essential information was not available. EPA scientists developed formal methodologies for establishing scientifically defensible criteria. These were subjected to review by the Agency's Science Advisory Board of outside experts and the public. This effort culminated on November 28, 1980, when the Agency published criteria development guidelines for aquatic life and for human health, along with criteria for 64 toxic pollutants. (See 45 FR 79318.) Since that initial publication, the aquatic life methodology was slightly amended (50 FR 30784, July 29, 1985) and additional criteria was proposed for public comment and finalized as Agency criteria guidance. EPA summarized the available criteria information in Quality Criteria for Water 1986 (1986 "Gold Book") which is updated from time-to-time. However, the individual criteria documents, as updated, are the official guidance documents.

EPA's criteria documents provide a comprehensive toxicological evaluation of each chemical. For toxic pollutants, the documents tabulate the relevant acute and chronic toxicity information for aquatic life and derive the criteria maximum concentrations (acute criteria) and criteria continuous concentrations (chronic criteria) which the Agency recommends to protect aquatic life resources. For human health criteria, the document provides the appropriate reference doses, and if appropriate, the carcinogenic slope factors, and derives recommend criteria. The details of this process are described more fully in a later part of this Preamble.

Programmatically, EPA's initial efforts were aimed at converting a program focused on interstate waters into one addressing all interstate and intrastate surface waters of the United States. Guidance was aimed at the inclusion of traditional water quality parameters to protect aquatic life (e.g., pH, temperature, dissolved oxygen and a narrative "free from toxicity" provision), recreation (e.g., bacteriological criteria) and general aesthetics (e.g., narrative "free from nuisance" provisions). EPA also required State adoption of an antidegradation policy to maintain existing high quality or ecologically unique waters as well as maintain improvements in water quality as they occur.

The initial water quality standards regulation was actually a part of EPA's water quality management regulations implementing section 303(e) (33 U.S.C. 1313(e)) of the Act. It was not comprehensive and did not address toxics or any other criteria specifically. Rather, it simply required States to adopt appropriate water quality criteria necessary to support designated uses. (See 40 CFR 130.17 as promulgated in 40 FR 55334, November 28, 1975).

After several years of effort and faced with increasing public and Congressional concerns about toxic pollutants, EPA realized that proceeding under section 307 of the Act would not comprehensively address in a timely manner the control of toxics through either toxic pollutant effluent standards or effluent limitations guidelines because these controls are only applicable to specific types of discharges. EPA sought a broader, more generally applicable mechanism and decided to vigorously pursue the alternative approach of EPA issuance of scientific water quality criteria documents which States could use to adopt enforceable water quality standards. These in turn could be used as the basis for establishing State and EPA permit discharge limits pursuant to section 301(b)(1)(C) which requires NPDES permits to contain

*** any more stringent limitation, including those necessary to meet water quality standards *** , or required to implement any applicable water quality standard established pursuant to this Act.

Thus, the adoption by States of appropriate toxics criteria applicable to their surface waters, such as those recommended by EPA in its criteria documents, would be translated by regulatory agencies into point source permit limits. Through the use of water quality standards, all discharges of

toxics are subject to permit limits and not just those discharged by particular industrial categories. In order to facilitate this process, the Agency amended the water quality standards regulation to explicitly address toxic criteria requirements in State standards. The culmination of this effort was the promulgation of the present water quality standards regulation on November 8, 1983 (40 CFR part 131, 48 FR 51400).

The current water quality standards regulation (40 CFR part 131) is much more comprehensive than its predecessor. The regulation addresses in detail both the beneficial use component and the criteria component of a water quality standard. Section 131.11 of the regulation requires States to review available information and,

*** to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use.

The regulation provided that either or both numeric and narrative criteria may be appropriately used in water quality standards.

EPA's water quality standards emphasis since the early 1980's reflected the increasing importance placed on controlling toxic pollutants. States were strongly encouraged to adopt criteria in their standards for the priority toxic pollutants, especially where EPA had published criteria guidance under section 304(a) of the Act.

Under the statutory scheme, during the 3-year triennial review period following EPA's 1980 publication of water quality criteria for the protection of human health and aquatic life, States should have reviewed those criteria and adopted standards for many priority toxic pollutants. In fact, State response to EPA's criteria publication and toxics initiative was disappointing. A few States adopted large numbers of numeric toxics criteria, although primarily for the protection of aquatic life. Most other States adopted few or no water quality criteria for priority toxic pollutants. Some relied on a narrative "free from toxicity" criterion, and so-called "action levels" for toxic pollutants or occasionally calculated site-specific criteria. Few States addressed the protection of human health by adopting numeric human health criteria.

In support of the November, 1983, water quality standards rulemaking, EPA issued program guidance entitled,

Water Quality Standards Handbook (December 1983) simultaneously with the publication of the final rule. The foreword to that guidance noted EPA's two-fold water quality based approach to controlling toxics: chemical specific numeric criteria and biological testing in whole effluent or ambient waters to comply with narrative "no toxics in toxic amounts" standards. More detailed programmatic guidance on the application of biological testing was provided in the Technical Support Document for Water Quality Based Toxics Control (TSD) (EPA 440/4-85-032, September 1985). This document provided the needed information to convert chemical specific and biologically based criteria into water quality standards for ambient receiving waters and permit limits for discharges to those waters. The TSD focused on the use of bioassay testing of effluent (so-called whole effluent testing or WET methods) to develop effluent limitations within discharge permits. Such effluent limits were designed to implement the "free from toxicity" narrative standards in State water quality standards. The TSD also focused on water quality standards. Procedures and policy were presented for appropriate design flows for EPA's section 304(a) acute and chronic criteria. In 1991, EPA revised and expanded the TSD. (Technical Support Document for Water Quality-based Toxics Control, EPA 505/2-90-001, March 1991.) A Notice of Availability was published in the Federal Register on April 4, 1991 (56 FR 13827). All references in this Preamble are to the revised TSD.

The Water Quality Standards Handbook and the TSD are examples of EPA's efforts and assistance that were intended to help, encourage and support the States in adopting appropriate water quality standards for the protection of their waters against the deleterious effects of toxic pollutants. In some States, more and more numeric criteria for toxics were being adopted as well as more aggressive use of the "free from toxics" narratives in setting protective NPDES permit limits. However, by the time of Congressional consideration and action on the CWA reauthorization, most States had adopted few, if any, water quality standards for priority toxic pollutants.

State practices of developing case-by-case effluent limits using procedures that were not standardized in State regulations made it difficult to ascertain whether such procedures were consistently applied. The use of approaches to control toxicity that did not rely on the statewide adoption of numeric criteria for the priority toxic

pollutants generated frustration in Congress. Senator Robert T. Stafford, first chairman and then ranking minority member of the authorizing committee, noted during the Senate debate:

An important problem in this regard is that few States have numeric ambient criteria for toxic pollutants. The lack of ambient criteria [for toxic pollutants] make it impossible to calculate additional discharge limitations for toxics * * *. It is vitally important that the water quality standards program operate in such a way that it supports the objectives of the Clean Water Act to restore and maintain the integrity of the Nation's Waters. (bracketed material added). A Legislative History of the Water Quality Act of 1987 (Pub. L. 100-4), Senate Print 100-144, USGPO, November 1988 at page 1324.

Other comments in the legislative history similarly note the Congressional perception that the States were failing to aggressively address toxics and that EPA was not using its oversight role to push the States to move more quickly and comprehensively. Thus Congress developed the water quality standards amendments to the Clean Water Act for reasons similar to those strongly stated during the Senate debate by a chief sponsor, Senator John H. Chafee,

A cornerstone of the bill's new toxic pollution control requirements is the so called beyond-BAT program * * *. Adopting the beyond BAT provisions will assure that EPA continues to move forward rapidly on the program * * *. If we are going to repair the damage to those water bodies that have become highly degraded as a result of toxic substances, we are going to have to move forward expeditiously on this beyond-BAT program. The Nation cannot tolerate endless delays and negotiations between EPA and States on this program. Both entities must move aggressively in taking the necessary steps to make this program work within the time frame established by this Bill * * *. Ibid, at page 1309.

This Congressional impatience with the pace of State and EPA progress and an appreciation that the lack of State standards for toxics undermined the effectiveness of the entire CWA-based scheme, resulted in the 1987 adoption of stringent new water quality standard provisions in the Water Quality Act amendments.

2. The Water Quality Act Amendments of 1987 (Pub. L. 100-4)

a. Description of the New Requirements

The 1987 Amendments to the Clean Water Act added Section 303(c)(2)(B) which provides:

Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic

pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8). Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

b. EPA's Initial Implementing Actions for Sections 303(c) and 304(l)

The addition of this new requirement to the existing water quality standards review and revision process of section 303(c) did not change the existing procedural or timing provisions. For example, section 303(c)(1) still requires that States review their water quality standards at least once each 3 year period and transmit the results to EPA for review. EPA's oversight and promulgation authorities and statutory schedules in section 303(c)(4) were likewise unchanged. Rather, the provision required the States to place heavy emphasis on adopting numeric chemical-specific criteria for toxic pollutants (i.e., rather than just narrative approaches) during the next triennial review cycle. As discussed in the previous section, Congress was frustrated that States were not using the numerous section 304(a) criteria that EPA had developed, and was continuing to develop, to assist States in controlling the discharge of priority toxic pollutants. Therefore, for the first time in the history of the Clean Water Act, Congress took the unusual action of explicitly mandating that States adopt numeric criteria for specific toxic pollutants.

In response to this new Congressional mandate, EPA redoubled its efforts to promote and assist State adoption of water quality standards for priority toxic pollutants. EPA's efforts included the development and issuance of guidance to the States on acceptable implementation procedures for several new sections of the Act, including sections 303(c)(2)(B) and 304(l).

The 1987 CWA Amendments added to, or amended, other CWA Sections related to toxics control. Section 304(l) (33 U.S.C. 1314(l)) was an important

corollary amendment because it required States to take actions to identify waters adversely affected by toxic pollutants, particularly those waters entirely or substantially impaired by point sources. Section 304(l) entitled "Individual Control Strategies for Toxic Pollutants," requires in part, that States identify and list waterbodies where the designated uses specified in the applicable water quality standards cannot reasonably be expected to be achieved because of point source discharge of toxic pollutants. For each segment so identified, the State is required to develop individual control strategies to reduce the discharge of toxics from point sources so that in conjunction with existing controls on point and nonpoint sources, water quality standards will be attained. To assist the States in identifying waters under section 304(l), EPA's guidance listed a number of potential sources of available data for States to review. States generally assembled data for a broad spectrum of pollutants, including the priority toxic pollutants, which could be useful in complying with sections 304(l) and 303(c)(2)(B). In fact, between February 1988 and October 1988, EPA assembled pollutant candidate lists for section 304(l) which were then transmitted to each jurisdiction. Thus, each State had a preliminary list of pollutants that had been identified as present in, or discharged to, surface waters. Such lists were limited by the quantity and distribution of available effluent and ambient monitoring data for priority toxic pollutants. This listing exercise further emphasized the need for water quality standards for toxic pollutants. Lack of standards increased the difficulty of identifying impaired waters. On the positive side, the data gathered in support of the 304(l) activity proved helpful in identifying those pollutants most obviously in need of water quality standards.

EPA, in devising guidance for section 303(c)(2)(B), attempted to provide States the maximum flexibility that complied with the express statutory language but also with the overriding congressional objective: Prompt adoption and implementation of numeric toxics criteria. EPA believed that flexibility was important so that each State could comply with section 303(c)(2)(B) and to the extent possible, accommodate its existing water quality standards regulatory approach. The options EPA identified are described in the next Section of this Preamble. EPA's program guidance was issued in final form on December 12, 1988 but was not

substantially different from earlier drafts available for review by the States. The availability of the guidance was published in a *Federal Register Notice* on January 5, 1989 (54 FR 346).

3. EPA's Program Guidance for Section 303(c)(2)(B)

EPA's section 303(c)(2)(B) program guidance identified three options that could be used by a State to meet the requirement that the State adopt toxic pollutant criteria " * * * the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses."

Option 1. Adopt statewide numeric criteria in State Water Quality Standards for all section 307(a) toxic pollutants for which EPA has developed criteria guidance, regardless of whether the pollutants are known to be present.

This option is the most comprehensive approach to satisfy the statutory requirements because it would include all of the priority toxic pollutants for which EPA has prepared section 304(a) criteria guidance for either or both aquatic life protection and human health protection. In addition to a simple adoption of EPA's section 304(a) guidance as standards, a State must select a risk level for those toxic pollutants which are carcinogens (i.e., that cause, or may cause cancer in humans).

Many States found this Option attractive because it ensured comprehensive coverage of the priority toxic pollutants with scientifically defensible criteria without the need to conduct a resource-intensive evaluation of the particular segments and pollutants requiring criteria. This option would also not be more costly to dischargers than other options because permit limits would only be based on the regulation of the particular toxic pollutants in their discharges and not on the total listing in the water quality standards. Thus, actual permit limits should be the same under any of the options.

Option 2. Adopt chemical-specific numeric criteria for priority toxic pollutants that are the subject of EPA section 304(a) criteria guidance, where the State determines based on available information that the pollutants are present or discharged and can reasonably be expected to interfere with designated uses.

This option results in the adoption of numeric water quality standards for some subset of those pollutants for which EPA has issued section 304(a) criteria guidance based on a review of

current information. To satisfy this Option, the guidance recommended that States use the data gathered during the section 304(l) water quality assessments as a starting point to identify those water segments that need water quality standards for priority toxic pollutants. That data would be supplemented by a State and public review of other data sources to ensure sufficient breadth of coverage to meet the statutory objective. Among the data available to be reviewed were: (1) Ambient water monitoring information, including those for the water column, sediment, and aquatic life (e.g., fish tissue data); (2) NPDES permit applications and permittee self-monitoring reports; (3) effluent guideline development documents, many of which contain priority toxic pollutant scans; (4) pesticide and herbicide application information and other records of pesticide or herbicide inventories; (5) public water supply source monitoring data noting pollutants with maximum contaminant levels (MCLs); and (6) any other relevant information on toxic pollutants collected by Federal, State, industry, agencies, academic groups, or scientific organizations. EPA also recommended that States selecting this option adopt a translator provision similar to that described in Option 3 but applicable to all chemicals causing toxicity, and not just priority toxic pollutants.

This Option 2 review resulted in a State proposing new or revised water quality standards and providing an opportunity for public review and comment on the pollutants, criteria, and water bodies included. Throughout this process, EPA's Regional Offices were available to assist States by providing additional guidance and technical assistance on applying EPA's recommended criteria to particular situations in the States.

Option 3. Adopt a procedure to be applied to a narrative water quality standard provision prohibiting toxicity in receiving waters. Such procedures would be used by the State in calculating derived numeric criteria which must be used for all purposes under section 303(c) of the CWA. At a minimum, such criteria need to be developed for section 307(a) toxic pollutants, as necessary to support designated uses, where these pollutants are discharged or present in the affected waters and could reasonably be expected to interfere with designated uses.

The combination of a narrative standard (e.g., "free from toxics in toxic amounts") and an approved translator mechanism as part of a State's water quality standards satisfies the

requirements of section 303(c)(2)(B). As noted above, such a procedure is also a valuable supplement to either option 1 or 2. There are several regulatory and scientific requirements EPA's guidance specifies are essential to ensure acceptable scientific quality and full involvement of the public and EPA in this approach. Briefly stated these are:

- The procedure (i.e., narrative criterion and translator) must be used to calculate numeric water quality criteria;
- The State must demonstrate to EPA that the procedure results in numeric criteria that are sufficiently protective to meet the goals of the Act;
- The State must provide for full opportunity for public participation during the adoption of the procedure;
- The procedure must be formally adopted as a State rule and be mandatory in application; and
- The procedure must be submitted for review and approval by EPA as part of the State's water quality standards regulation.

The scientific elements of a translator are similar to EPA's 304(a) criteria methodologies when applied on a site-specific basis. For example, aquatic criteria are developed using a sufficient number and diversity of aquatic species representative of the biological assemblage of a particular water body. Human health criteria focus on determining appropriate exposure conditions (e.g. amount of aquatic life consumed per person per day) rather than underlying pollutant toxicity. The results of the procedures are scientifically defensible criteria that are protective for the site's particular conditions. EPA's review of translator procedures includes an evaluation of the scientific merit of the procedure using the section 304(a) methodology as a guide.

Ideally, States adopting option 3 translator procedures should prepare a preliminary list of criteria and specify the waters the criteria apply to at the time of adoption. Although under option 3 the State retains flexibility to derive new criteria without revising the adopted standards, establishing this preliminary list of derived criteria at the time of the triennial review will assist the public in determining the scope of the adopted standards, and help ensure that the State ultimately complies with the requirement to establish criteria for all pollutants that can "reasonably be expected" to interfere with uses. EPA believes that States selecting solely option 3 should prepare an analysis (similar to that required of option 2 States) at the time of the triennial review identifying pollutants needing criteria.

EPA's December 1988 guidance also addressed the timing issue for State compliance with section 303(c)(2)(B). The statutory directive was clear: All State standards triennial reviews initiated after passage of the Act must include a consideration of numeric toxic criteria.

The structure of section 303(c) is to require States to review their water quality standards at least once each three year period. Section 303(c)(2)(B) instructs States to include reviews for toxics criteria whenever they initiate a triennial review. EPA initially looked at February 4, 1990, the 3-year anniversary of the 1987 CWA amendments, as a convenient point to index State compliance. The April 1990 Federal Register Notice used this index point for the preliminary assessment. However, some States were very nearly completing their State administrative processes for ongoing reviews when the 1987 amendments were enacted and could not legally amend those proceedings to address additional toxics criteria. Therefore, in the interest of fairness, and to provide such States a full 3-year review period, EPA's FY 1990 Agency Operating Guidance provided that "By the end of the FY 88-90 triennium, States should have completed adoption of numeric criteria to meet the section 303(c)(2)(B) requirements." (p.48.) The FY 88-90 triennium ended on September 30, 1990.

Clean Water Act section 303(c) does not provide penalties for States that do not complete timely water quality standards reviews. In no previous case has the EPA Administrator found that State failure to complete a review within three years jeopardized the public health or welfare to such an extent that promulgation of Federal standards pursuant to section 303(c)(4)(B) was justified. The pre-1987 CWA never mandated State adoption of priority toxic pollutants or other specific criteria. EPA generally relied on its water quality standards regulation (40 CFR 131.11) and its criteria and program guidance to the States on appropriate parametric coverage in State water quality standards to encourage State adoption of water quality standards. However, since the 1987 statutory amendments, the programmatic environment has changed. Beyond the increased Congressional and public concern, about the relative importance of toxic pollutant controls, there is increased evidence of toxic pollution problems in our Nation's waters. In response, the Agency in this rulemaking is proceeding pursuant to section 303(c)(4)(B) and 40

CFR 131.22(b) to rectify a longstanding program deficiency.

The current regulation at 40 CFR Part 131 in conjunction with the statutory language provides a clear and unambiguous basis and process for today's Federal promulgation.

C. State Actions Pursuant to Section 303(c)(2)(B)

In recent years, there has been substantial progress by many States in the adoption, and EPA approval, of water quality standards for toxic pollutants. Virtually all States have at least proposed new toxics criteria for priority toxic pollutants since section 303(c)(2)(B) was added to the CWA in February of 1987. Unfortunately, not all such State proposals address, in a comprehensive manner, the requirements of section 303(c)(2)(B). For example, some States have proposed to adopt criteria to protect aquatic life, but not human health; other States have proposed human health criteria which do not address major human exposure pathways. In addition, in some cases final adoption of proposed State toxics criteria which would be approvable by EPA has been substantially delayed due to controversial and difficult issues associated with the toxics criteria adoption process. For purposes of today's rulemaking, it is EPA's judgment that 43 States completed actions which fully satisfy the requirements of section 303(c)(2)(B).

In sum, States have devoted substantial resources, and have made substantial progress, in adopting new or revised numeric criteria for priority pollutants. In so doing, they have addressed a number of significant and difficult issues. These efforts have generated extensive examination by dischargers, States, environmental groups and the public on all aspects of the CWA water quality criteria and related issues. It amounts to a multi-year consideration of the issues that are central to this proposed and final rulemaking.

D. Determining State Compliance With Section 303(c)(2)(B)

1. EPA's Review of State Water Quality Standards for Toxics

The EPA Administrator has delegated the responsibility and authority for review and approval or disapproval of all State water quality standards actions to the 10 EPA Regional Administrators (see 40 CFR 131.21). State section 303(c)(2)(B) actions are thus submitted to the appropriate EPA Regional Administrator for review and approval. This de-centralized EPA system for

State water quality standards review and approval is guided by EPA Headquarters Office of Water, which issues national policies and guidance to the States and Regions such as the annual Office of Water Operating Guidance and various technical manuals.

For purposes of evaluating State compliance with CWA section 303(c)(2)(B), EPA relied on the statutory language, the existing water quality standards regulation, and section 303(c)(2)(B) national guidance to provide the basis for EPA review. In some cases, individual Regions also used Regional policies and procedures in reviewing State section 303(c)(2)(B) actions. The flexibility provided by the national guidance, coupled with subtle differences in Regional policies and procedures, contributed to some differences in the approaches taken by States to satisfy section 303(c)(2)(B) requirements.

As discussed previously, EPA's final guidance on compliance with section 303(c)(2)(B) was developed to provide States with the necessary flexibility to allow State standards revisions that would complement the State's existing water quality standards program and still comply with section 303(c)(2)(B). As guidance, it described the range of acceptable approaches and EPA's recommendations. Some innovative State approaches were expected as well as differences in terms of criteria coverage, stringency and application procedures.

Although the guidance provided for State flexibility, it was also consistent with existing water quality standards regulation requirements of 40 CFR 131.11 that explicitly require State criteria to be sufficient to protect designated uses. Such water quality criteria also must be based on sound scientific rationale and support the most sensitive use designated for a water body.

The most complicated EPA compliance determinations involve States that selected EPA Options 2 or 3. Since most States use EPA's section 304(a) criteria guidance, where States select Option 1, EPA normally is able to focus Agency efforts on verifying that all available EPA criteria are included, appropriate cancer risk levels are selected, and that sufficient application procedures are in place (e.g. laboratory analytical methods, mixing zones, flow condition, etc.).

However, for States using EPA's Option 2 or 3, substantially more EPA evaluation and judgment was required because the Agency must evaluate which priority pollutants and, in some

cases, segments or designated uses, require numeric criteria. Under these options, the State must adopt or derive numeric criteria for priority toxic pollutants for which EPA has section 304(a) criteria, " * * * the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State * * *." The necessary justification and the ultimate coverage and acceptability of a State's actions vary State-to-State because of differences in the adequacy of available monitoring information, local waterbody use designations, the effluent and nonpoint source controls in place, and different approaches to the scientific basis for criteria.

In submitting criteria for the protection of human health, States were not limited to a 1 in 1 million risk level (10^{-6}). EPA generally regulates pollutants treated as carcinogens in the range of 10^{-6} to 10^{-4} to protect average exposed individuals and more highly exposed populations. If a State selects a criterion that represents an upper bound risk level less protective than 1 in 100,000 (i.e., 10^{-5}), however, the State needed to have substantial support in the record for this level. This support focused on two distinct issues. First, the record must include documentation that the decision maker considered the public interest of the State in selecting the risk level, including documentation of public participation in the decision making process as required by the water quality standards regulation at 40 CFR 131.20(b). Second, the record must include an analysis showing that the risk level selected, when combined with other risk assessment variables, is a balanced and reasonable estimate of actual risk posed, based on the best and most representative information available. The importance of the estimated actual risk increases as the degree of conservatism in the selected risk level diminishes. EPA carefully evaluated all assumptions used by a State if the State chose to alter any one of the standard EPA assumption values.

Where States selected Option 3, EPA reviews must also include an evaluation of the scientific defensibility of the translator procedure. EPA must also verify that a requirement to apply the translator whenever toxics may reasonably be expected to interfere with designated uses (e.g., where such toxics exist or are discharged) is included in the State's water quality standards. Satisfactory application procedures must also be developed by States selecting Option 3.

In general, each EPA Region made compliance decisions based on

whatever information was available at the time of the triennial review. For some States, information on the presence and discharge of priority toxic pollutants is extremely limited. Nevertheless, during the period of February 1988 to October 1990, to supplement State efforts, EPA assembled the available information and provided each State with various pollutant candidate lists in support of the section 304(l) and section 303(c)(2)(B) activities. These were based in part on computerized searches of existing Agency data bases.

Beginning in 1988, EPA provided States with candidate lists of priority toxic pollutants and water bodies in support of CWA Section 304(l) implementation. These lists were developed because States were required to evaluate existing and readily available water-related data in order to comply with Section 304(l), 40 CFR 130.10(d). A similar "strawman" analysis of priority pollutants potentially requiring adoption of numeric criteria under Section 303(c)(2)(B) was furnished to most States in September or October of 1990 for their use in on-going and subsequent triennial reviews. The primary differences between the "strawman" analysis and the section 304(l) candidate lists were that the "strawman" analysis: (1) Organized the results by chemical rather than by water body, (2) included data for certain STORET monitoring stations that were not used in constructing the candidate lists, (3) included data from the Toxics Release Inventory database, and (4) did not include a number of data sources used in preparing the candidate lists (e.g. those, such as fish kill information, that did not provide chemical specific information).

In its 1988 section 303(c)(2)(B) guidance, EPA urged States, at a minimum, to use the information gathered in support of section 304(l) requirements as a starting point for identifying which priority toxic pollutants require adoption of numeric criteria. EPA also encouraged States to consider the presence or potential construction of facilities that manufacture or use priority toxic pollutants as a strong indication of the need for toxics criteria. Similarly, EPA indicated to States that the presence of priority pollutants in ambient waters (including those in sediments or in aquatic life tissue) or in discharges from point or nonpoint sources also be considered as an indication that toxics criteria should be adopted. A limited amount of data on the effluent characteristics of NPDES discharges was

readily available to States. States were also expected to take into account newer information as it became available, such as information in annual reports from the Toxic Chemical Release Inventory requirements of the Emergency Planning and Community Right-To-Know Act of 1986. (Title III, Pub. L. 99-499.)

In summary, EPA and the States had access to a variety of information gathered in support of section 304(l), section 303(c)(2)(B), and section 305(b) activities. For some States, as noted above, such information for priority toxic pollutants is extremely limited. In the final analysis, the Regional Administrator made a judgment on a duly submitted State standards triennial review based on the State's record and the Region's independent knowledge of the facts and circumstances surrounding the State's actions. These actions, taken in consultation with the Office of Water, determined which State actions were sufficiently consistent with the coverage contemplated in the statute to justify approval. These approval actions include allowable variations among State water quality standards. EPA approval indicates that, based on the record, the State water quality standards met the requirements of the Act.

2. Determining Current Compliance Status

The following summarizes the process generally followed by the Agency in assessing compliance with section 303(c)(2)(B).

A State was determined to be in full compliance with the requirements of section 303(c)(2)(B) if,

a. The State had submitted a water quality standards package for EPA review since enactment of the 1987 Clean Water Act amendments or was determined to be already in compliance, and,

b. The State adopted water quality standards are effective under State law and consistent with the CWA and EPA's implementing regulations (EPA's December 1988 guidance described three Options, any one, or a combination of which EPA suggested States could adopt for compliance with the CWA and EPA regulations), and

c. EPA has issued a formal approval determination to the State.

States meeting these criteria are not included in this final rulemaking.

States which adopted standards following Option 1 generally have been found to satisfy section 303(c)(2)(B). An exception exists for selected States which attempted to follow Option 1 by adopting all EPA section 304(a) criteria by reference. EPA has withheld

approval for one State which has adopted such a reference into their standards because the adopted standards did not specify application factors necessary to implement the criteria (e.g., a risk level for carcinogens). Other States have achieved full compliance following options 1, 2, 3, or some combination of these options.

As of the date of signature of today's rule, the Agency has determined that 43 States and Territories are in full compliance with the requirements of section 303(c)(2)(B). Compliance status for all States and Territories is set forth in Table 1.

TABLE 1.—ASSESSMENT OF STATE COMPLIANCE WITH CWA SECTION 303(c)(2)(B)

State	Is State in compliance with section 303(c)(2)(B)?
Alabama	Yes.
Alaska	No.
Arizona	Yes.
Arkansas	No.
California	No.
Colorado	Yes.
Connecticut	Yes.
Delaware	Yes.
Florida	No.
Georgia	Yes.
Hawaii	Yes.
Idaho	No.
Illinois	Yes.
Indiana	Yes.
Iowa	Yes.
Kansas	No.
Kentucky	Yes (1).
Louisiana	Yes.
Maine	Yes.
Maryland	Yes.
Massachusetts	Yes.
Michigan	No.
Minnesota	Yes.
Mississippi	Yes.
Missouri	Yes.
Montana	Yes.
Nebraska	Yes.
Nevada	No.
New Hampshire	Yes.
New Jersey	No.
New Mexico	Yes (2).
New York	Yes.
North Carolina	Yes.
North Dakota	Yes.
Ohio	Yes.
Oklahoma	Yes.
Oregon	Yes.
Pennsylvania	Yes.
Rhode Island	No.
South Carolina	Yes.
South Dakota	Yes.
Tennessee	Yes.
Texas	Yes.
Utah	Yes.
Vermont	No.
Virginia	Yes.
Washington	No.
West Virginia	Yes.
Wisconsin	Yes.
Wyoming	Yes.
American Samoa	Yes.
Commonwealth of the Northern Mariana Islands	Yes.
District of Columbia	No.

TABLE 1.—ASSESSMENT OF STATE COMPLIANCE WITH CWA SECTION 303(c)(2)(B)—Continued

State	Is State in compliance with section 303(c)(2)(B)?
Guam	Yes.
Puerto Rico	No.
Tr. Territories	Yes.
Virgin Islands	Yes.

Notes to Table 1

(1) At the initiation of this rulemaking, Kentucky was determined to be in compliance with the Act. On January 27, 1992, the Commonwealth of Kentucky deleted the water quality criteria for dioxin from the Kentucky water quality standards. Although EPA has not formally acted to disapprove Kentucky's action to delete the criteria, information is available which documents the need for dioxin criteria for the Commonwealth of Kentucky. Any potential EPA promulgation arising from a future EPA action to disapprove the deletion of the dioxin criteria for Kentucky will be through a rulemaking independent of today's rule.

(2) At the initiation of this rulemaking, New Mexico was determined to be in compliance with the Act. On October 8, 1991, New Mexico adopted revisions to its standards which affected compliance with acute toxicity criteria. On January 13, 1992, EPA disapproved the State's action, thus initiating the possibility of Federal promulgation should the State fail to adopt acceptable standards within 90 days from the EPA notice. Any potential EPA promulgation arising from this disapproval will be through a rulemaking independent of today's rule. EPA policy has been and continues to be that we prefer States and Territories to adopt their own standards consistent with the requirements of the Clean Water Act.

(3) EPA has become aware that several of the State water quality standards approved as complying with section 303(c)(2)(B) have been challenged in State courts for various reasons. Additional such challenges may occur in the future. In cases where such State rules are remanded or otherwise set aside, or intentionally withdrawn by the State for any reason, and the State does not pursue in good faith correcting such defects in a timely manner, it is EPA's intention to initiate appropriate rulemaking to put in place appropriate criteria for priority toxic pollutants to bring State water quality standards into compliance with the Clean Water Act.

E. Rationale and Approach for Developing the Final Rule

The addition of section 303(c)(2)(B) to the Clean Water Act was an unequivocal signal to the States that Congress wanted toxics criteria in the State's water quality standards. The legislative history notes that the "beyond BAT" program (i.e., controls necessary to comply with water quality standards that are more stringent than technology-

based controls) was the cornerstone to the Act's toxic pollution control requirements.

The major innovation of the 1972 Clean Water Act Amendments was the concept of effluent limitation guidelines which were to be incorporated into NPDES permits. In many cases, this strategy has succeeded in halting the decline in the quality of the Nation's waters and, often, has provided improvements. However, the effluent limitation guidelines for industrial discharges and the similar technology-based secondary treatment requirements for municipal discharges are not capable, by themselves, of ensuring that the fishable-swimmable goals of the Clean Water Act will be met for all waters.

The basic mechanism to accomplish this in the Act is water quality standards. States are required to periodically review and revise these standards to achieve the goals of the Act. In the 1987 CWA amendments, Congress focused on addressing toxics in several sections of the Act, but special attention was placed on the section 303 water quality standards program requirements. Congress intended that the adoption of numeric criteria for toxics would result in direct improvements in water quality by forcing, where necessary, effluent limits more stringent than those resulting from technology-based effluent limitations guidelines.

As the legislative history demonstrates, Congress was dissatisfied with the piecemeal, slow progress being made by States in setting standards for toxics. Congress reacted by legislating new requirements and deadlines directing the States to establish toxics criteria for pollutants addressed in EPA section 304(a) criteria guidance, especially for those priority toxic pollutants that could reasonably be expected to interfere with designated uses. In today's action, EPA is exercising its authority under section 303(c)(4) to promulgate criteria where States have failed to act in a timely manner.

The previous section of this preamble explains EPA's approach to evaluating the adequacy of State actions in response to section 303(c)(2)(B). This section explains EPA's legal basis for issuing today's rule, and discusses EPA's general approach for developing the State-specific requirements in Section 131.36(d).

In addition to the Congressional directive and the legal basis for this action, there are a number of environmental and programmatic reasons why further delay in

establishing water quality standards for toxic pollutants is no longer acceptable.

Prompt control of toxic pollutants in surface waters is critical to the success of a number of Clean Water Act programs and objectives, including permitting, enforcement, fish tissue quality protection, coastal water quality improvement, sediment contamination control, certain nonpoint source controls, pollution prevention planning, and ecological protection. The decade long delay in State adoption of water quality standards for toxic pollutants has had a ripple effect throughout EPA's water programs. Without clearly established water quality goals, the effectiveness of many water programs is jeopardized. For too long, the absence of water quality standards has had a chilling effect on toxic control progress in many State and Federal programs.

Failure to take prompt action at this juncture would also undermine the continued viability of the current statutory scheme to establish standards. Excessive delay subverts the entire concept of the triennial review cycle which is intended to combine current scientific information with the results of previous environmental control programs to direct continuing progress in enhancing water quality.

Finally, another reason to proceed expeditiously is to bring closure to this long-term effort and allow State attention and resources to be directed towards important, new national program initiatives. Until standards for toxic pollutants are in place, neither EPA nor the States can fully focus on the emerging, ecologically-based water quality activities such as wetlands criteria, biological criteria and sediment criteria.

1. Legal Basis

Clean Water Act Section 303(c) specifies that adoption of water quality standards is primarily the responsibility of the States. However, Section 303(c) also describes a role for EPA of overseeing State actions to ensure compliance with CWA requirements. If the Agency's review of the State's standards finds flaws or omissions, then the Act authorizes EPA to initiate promulgation to correct the deficiencies (see section 303(c)(4)). The water quality standards promulgation authority has been used by EPA to issue final rules on nine separate occasions. These actions have addressed both insufficiently protective State criteria and/or designated uses and failure to adopt needed criteria. Thus, today's action is not unique, although it would affect more States and pollutants than previous actions taken by the Agency.

The Clean Water Act in section 303(c)(4) provides two bases for promulgation of Federal water quality standards. The first basis, in paragraph (A), applies when a State submits new or revised standards that EPA determines are not consistent with the applicable requirements of the Act. If, after EPA's disapproval, the State does not promptly amend its rules so as to be consistent with the Act, EPA must promulgate appropriate Federal water quality standards for that State. The second basis for EPA's action is paragraph (B), which provides that EPA shall promptly initiate promulgation " * * * in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act." EPA is relying on both section 303(c)(4)(A) and section 303(c)(4)(B) as the legal basis for this rule.

Section 303(c)(4)(A) supports today's action for several States. These States have submitted criteria for some number of priority toxic pollutants and EPA has disapproved the State's adopted standards. The basis for EPA's disapproval generally has been the lack of sufficient criteria or particular criteria that were insufficiently stringent. In these cases, EPA has, by letter to the State, noted the deficiencies and specified the need for corrective action. Not having received an appropriate correction within the statutory time frame, EPA is today promulgating the needed criteria. The action in today's rule pursuant to section 303(c)(4)(A) may differ from those taken pursuant to section 303(c)(4)(B) by being limited to criteria for specific priority toxic pollutants, particular geographic areas, or particular designated uses.

Section 303(c)(4)(B) is the basis for EPA's requirements for most States. For these States, the Administrator has determined that promulgating criteria is necessary to bring the States into compliance with the requirements of the CWA. In these cases, EPA is promulgating, at a minimum, criteria for all priority toxic pollutants not addressed by approved State criteria. EPA is also promulgating criteria for priority toxic pollutants where any previously-approved State criteria do not reflect current science contained in revised criteria documents and other guidance sufficient to fully protect all designated uses or human exposure pathways, or where such previously-approved State criteria are not applicable to all appropriate designated uses. EPA's action pursuant to section 304(c)(4)(B) may include several situations.

In some cases, the State has failed to adopt and submit for approval any criteria for those priority toxic pollutants for which EPA has published criteria. This includes those States that have not submitted triennial reviews. In other cases, the State has adopted and EPA has approved criteria for either aquatic life or human health, but not both. In yet a third situation, States have submitted some criteria but not all necessary criteria. Lastly, one State has submitted criteria that do not apply to all appropriate geographic sections of the waters of the State.

The use of section 303(c)(4)(B) requires a determination by the Administrator " * * * that a revised or new standard is necessary to meet the requirements of * * * " the Act. The Administrator's determination could be supported in different ways.

One approach would be for EPA to undertake a time-consuming effort to research and marshal data to demonstrate the need for promulgation for each criteria for each stream segment or waterbody in each State. This would include evidence for each Section 307(a) priority toxic pollutant for which EPA has Section 304(a) criteria and that there is a "discharge or presence" which could reasonably "be expected to interfere with" the designated use. This approach would not only impose an enormous administrative burden, but would be contrary to the statutory scheme and the compelling Congressional directive for swift action reflected in the 1987 addition of section 303(c)(2)(B) to the Act.

An approach that is more reasonable and consistent with Congressional intent focuses on the State's failure to complete the timely review and adoption of the necessary standards required by section 303(c)(2)(B) despite information that priority toxic pollutants may interfere with designated uses of the State's waters. This approach is consistent with the fact that in enacting section 303(c)(2)(B) Congress expressed its determination of the necessity for prompt adoption and implementation of water quality standards for toxic pollutants. Therefore, a State's failure to meet this fundamental 303(c)(2)(B) requirement of adopting appropriate standards constitutes a failure "to meet the requirements of the Act." That failure to act can be a basis for the Administrator's determination under section 303(c)(4)(B) that new or revised criteria are necessary to ensure designated uses are adequately protected. Here, this determination is buttressed by the existence of evidence of the discharge or presence of priority toxic pollutants in

a State's waters for which the State has not adopted numeric water quality criteria. The Agency has compiled an impressive volume of information in the record for this rulemaking on the discharge or presence of toxic pollutants in State waters. This data supports the Administrator's determination pursuant to section 303(c)(4)(B). The record was available to the public for review during this rulemaking period and continues to be on file.

The Agency's choice to base the determination on the second approach is supported by both the explicit language of the statutory provision and by the legislative history. Congress added subsection 303(c)(2)(B) to section 303 with full knowledge of the existing requirements in section 303(c)(1) for triennial water quality standards review and submission to EPA and in section 303(c)(4)(B) for EPA promulgation. There was a clear expectation that these provisions be used in concert to overcome the programmatic delay that many legislators criticized and achieve the Congressional objective of the rapid availability of enforceable water quality standards for toxic pollutants. As quoted earlier, chief Senate sponsors, including Senators Stafford, Chaffee and others, wanted the provision to eliminate State and EPA delays and force aggressive action.

In normal circumstances, it might be argued that to exercise section 303(c)(4)(B) the Administrator might have the burden of marshalling conclusive evidence of "necessity" for Federally promulgated water quality standards. However, in adopting section 303(c)(2)(B), Congress made clear that the "normal" procedure had become inadequate. The specificity and deadline in section 303(c)(2)(B) were layered on top of a statutory scheme already designed to achieve the adoption of toxic water quality standards. Congressional action to adopt a partially redundant provision was driven by their impatience with the lack of State progress. The new provision was essentially a Congressional "determination" of the necessity for new or revised comprehensive toxic water quality standards by States. In deference to the principle of State primacy, Congress, by linking section 303(c)(2)(B) to the section 303(c)(1) three-year review period, gave States a last chance to correct this deficiency on their own. However, this Congressional indulgence does not alter the fact that section 303(c)(2)(B) changed the nature of the CWA State/EPA water quality standard relationship. The new provision and its legislative background indicate that the Administrator's

determination to invoke his section 303(c)(4)(B) authority in this circumstance can be met by a generic finding of inaction on the part of a State and without the need to develop data for individual stream segments. Otherwise, the Agency could face a heavy data gathering burden of justifying the need for each Federal criterion and the process could stretch for years and never be realized. To interpret the combination of subsections (c)(2)(B) and (c)(4) as an effective bar to prompt achievement of statutory objectives would be a perverse conclusion and render section 303(c)(2)(B) essentially meaningless.

A second strong argument against requiring EPA to shoulder a heavy burden to exercise section 303(c)(4)(B) authority is that it would invert the traditional statutory scheme of EPA as national overseer and States as the entity with the greatest local expertise. The CWA provides States the flexibility to tailor water quality standards to local conditions and needs based upon their wealth of first-hand experience, knowledge and data. However, this allowance for flexibility is based on an assumption of reasoned and timely State action, not an abdication of State responsibility by failure to act. EPA does not possess the local expertise or resources necessary to successfully tailor State water quality standards. Therefore, the fact that the CWA allows States flexibility in standards development does not impose an inappropriate burden on EPA in the exercise of its oversight promulgation responsibilities. A broad Federal promulgation based on a showing of State inaction coupled with basic information on the discharge and presence of toxic pollutants meets the statutory objective of having criteria in places that are protective of public health and the environment. Without local expertise to help accurately narrow this list of pollutants and segments requiring criteria, there is no assurance of comparable protection. Nothing in the overall statutory water quality standards scheme anticipates EPA would develop this expertise in lieu of the States. EPA's lack of familiarity with local conditions argues strongly for a simple "determination" test to trigger section 303(c)(4)(B) promulgations. It also supports the concept of an across-the-board rulemaking for all priority toxic pollutants with section 304(a) criteria.

A final major reason supporting a simple determination to trigger section 303(c)(4)(B) action is that comprehensive Federal promulgation imposes no undue or inappropriate

burden on States or dischargers. It merely puts in place standards for toxic pollutants that are utilized in implementing Clean Water Act programs. Under this rulemaking, a State still retains the ability to adopt alternative water quality standards simply by completing its standards adoption process. Upon EPA approval of those standards, EPA will take actions to withdraw the Federally-promulgated criteria.

Federal promulgation of State water quality standards should be a course of last resort. It is symptomatic of something awry with the basic statutory scheme. Yet, when it is necessary to exercise this authority, as the compelling evidence suggests in this case, there should be no undue impediments to its use. Section 303(c)(4) is replete with deadlines and Congressional directives for the Administrator to act "promptly" in these cases. The statute indicates that the Administrator of EPA, is to " * * * promptly prepare and publish proposed regulations setting forth a revised or new water quality standard * * *" and " * * * shall promulgate any revised or new standard * * * not later than 90 days after he published such proposed standards, unless prior to such promulgation, such State has adopted a revised or new standard which the Administrator determines to be in accordance with the Act." The adoption of section 303(c)(2)(B) reinforced this emphasis on expeditious actions. EPA has demonstrated extensive deference to State primacy and a willingness to provide broad flexibility in their adoption of State standards for toxics. However, to fulfill its statutory obligation requires that EPA's deference and flexibility cannot be unlimited.

For the reasons just discussed, EPA does not believe it is necessary to support the criteria promulgated today on a pollutant specific, State-by-State, waterbody-by-waterbody basis. Nonetheless, over the course of the past several years in working with and assisting the States, the Agency has reviewed the readily-available data on the discharge and presence of priority toxic pollutants. While this data is not necessarily complete, it constitutes a substantial record to support a strong *prima facie* case for the need for numeric criteria for most priority toxic pollutants with section 304(a) criteria guidance in most States. In the absence of final State actions to adopt criteria pursuant to either Option 2 or 3 which meet the requirements for EPA approval, this evidence strongly supports EPA's decision to promulgate, pursuant to section 303(c)(4)(B), criteria

for all priority toxic pollutants not fully addressed by State criteria. The EPA data supporting this assertion is discussed more fully in the next section.

2. Approach for Developing the Final Rule

The State-specific requirements in § 131.36(d) were developed using one of two approaches. In the formal review of the adopted standards for certain States, EPA determined that specific numeric toxics criteria are lacking. For some, criteria were omitted from the State standards, even though in EPA's judgment, the pollutants can reasonably be expected to interfere with designated uses. In these cases where EPA specifically identified deficiencies in a State submission, this rule establishes Federal criteria for that limited number of priority toxic pollutants necessary to correct the deficiency.

For the balance of the States, EPA applies, to all appropriate State waters, the section 304(a) criteria for all priority toxic pollutants which are not the subject of approved State criteria. EPA also is promulgating Federal criteria for priority toxic pollutants where any previously-approved State criteria do not reflect current science contained in revised criteria documents and other guidance sufficient to fully protect all designated uses or human health exposure pathways, where such previously-approved State criteria do not protect against both acute and chronic aquatic life effects, or where such previously-approved State criteria are not applicable to all appropriate State designated uses.

Absent a State-by-State pollutant specific analysis to narrow the list, existing data sources strongly support a comprehensive rulemaking approach. Information in the rulemaking record from a number of sources indicates the discharge, potential discharge or presence of virtually all priority toxic pollutants in all States. The data available to EPA was assembled into a "strawman" analysis designed to identify priority toxic pollutants that potentially require the adoption of numeric criteria. Information on pollutants discharged or present was identified by accessing various national data sources:

- Final section 304(l) short lists identifying toxic pollutants likely to impair designated uses;
- Water column, fish tissue and sediment observations in the Storage Retrieval (STORET) data base (i.e., where the pollutant was detected);
- The National Pollutant Discharge Elimination System's (NPDES) Permit Compliance System data base to

identify those pollutants limited in direct dischargers' permits;

- Pollutants included on Form 2(c) permit applications which have been submitted by wastewater dischargers;
- Information on discharges to surface waters or POTWs from the Toxics Release Inventory required by the Emergency Planning and Community Right-To-Know Act of 1986 (Title III, P.L. 99-499);
- Pollutants predicted to be in the effluent of NPDES dischargers based on industry-specific analyses conducted for the Clean Water Act effluent guideline program.

The extent of this data supports a conclusion that promulgation of Federal criteria for all priority toxic pollutants with section 304(a) criteria guidance documents is appropriate for those States that have not completed their standards adoption process. This conclusion is supported by several other factors.

First, many of the available data sources have limitations which argue against relying on them solely to identify all needed water quality criteria. For example, the section 304(l) short lists only identified water bodies where uses were impaired by point source discharges; State 304(l) long lists did not generally identify pollutants causing use impairment by nonpoint sources. Other available data sources (i.e., NPDES permit limits) have a similar narrow scope because of their particular purposes. Even the value of those data bases designed to identify ambient water problems is restricted by the availability of monitoring data. In many States, the quantity, spatial and temporal distribution, and pollutant coverage of monitoring data is severely limited. For example, the most recent Water Quality Inventory Report to Congress included an evaluation of use attainment for only one-third of all river miles and less than one-half of lake acres. Even for those waters where use attainment status was reported, many assessments were based on data which did not include the chemical-specific information necessary to identify the priority toxic pollutants which pose a threat to designated uses. After evaluating this data, EPA concluded that it most likely understates the adverse presence or discharge of priority toxic pollutants.

Further evidence justifying a broad promulgation rulemaking can be found in the State actions to date in their standards adoption process. While many have not come to completion, the initial steps have led many States to develop or propose rulemaking

packages with extensive pollutant coverage. The nature of these preliminary State determinations argues for a Federal promulgation of all section 304(a) criteria pollutants to ensure adequate public health and environmental protection against priority toxic pollutant insults.

The detailed assumptions and approach followed by EPA in writing the § 131.36(d) requirements for all jurisdictions are described below. In the following discussions, EPA refers to these assumptions and approach as "rules."

(1) No criteria are promulgated for States which have been fully approved by EPA as complying with the section 303(c)(2)(B) requirements.

(2) For States which have not been fully approved, if EPA has not previously determined which specific pollutants/criteria/waterbodies are lacking from a State's standards (i.e., as part of an approval/disapproval action only), all of the criteria in Columns B, C, and D of the § 131.36(b) matrix are promulgated for statewide application to all appropriate designated uses, except as provided for elsewhere in these rules. That is, EPA brought the State into compliance with section 303(c)(2)(B) via an approach which is comparable to option 1 of the December 1988 national guidance for section 303(c)(2)(B).

(3) If EPA has previously determined which specific pollutants/criteria/waterbodies are needed to comply with CWA section 303(c)(2)(B) (i.e., as part of an approval/disapproval action only), the criteria in § 131.36(b) are promulgated for only those specific pollutants/criteria/waterbodies (i.e., EPA brought the State into compliance via an approach which is comparable to option 2 of the December 1988 national guidance for section 303(c)(2)(B)).

(4) For aquatic life, except as provided for elsewhere in these rules, all waters with designated aquatic life uses providing even minimal support to aquatic life are included in the rule (i.e., fish survival, marginal aquatic life, etc.).

(5a) For human health, except as provided for elsewhere in these rules, all waters with designated uses providing for public water supply protection (and therefore a potential water consumption exposure route) or minimal aquatic life protection (and therefore a potential fish consumption exposure route) are included in the rule.

(5b) Where a State has determined the specific aquatic life segments which provide a fish consumption exposure route (i.e., fish or other aquatic life are being caught and consumed) and EPA approved this determination as part of

a standards approval/disapproval action, the rule includes the fish consumption (Column D2) criteria for only those aquatic life segments, except as provided for elsewhere in these rules. In making a determination that certain segments do not support a fish consumption exposure route, a State must have completed, and EPA approved, a use attainability analysis consistent with the provisions of 40 CFR 131.10(j). In the absence of such an approved State determination, EPA promulgated fish consumption criteria for all aquatic life segments.

(6) Uses/Classes other than those which support aquatic life or human health are not included in the rule (e.g., livestock watering, industrial water supply), unless they are defined in the State standards as also providing protection to aquatic life or human health (i.e., unless they are described as protecting multiple uses including aquatic life or human health). For example, if the State standards include a use such as industrial water supply, and in the narrative description of the use the State standards indicate that the use includes protection for resident aquatic life, then this use is included in this rule.

(7) For human health, the "water + fish" criteria in Column D1 of § 131.36(b) are promulgated for all waterbodies where public water supply and aquatic life uses are designated, except as provided for elsewhere in these rules (e.g., rule 9).

(8) If the State has public water supplies where aquatic life uses have not been designated, or public water supplies that have been determined not to provide a potential fish consumption exposure pathway, the "water + organisms only" criteria in Column D1 of § 131.36(b) are promulgated for such waterbodies, except as provided for elsewhere in these rules (e.g., rule 9).

(9) EPA is generally not promulgating criteria for priority toxic pollutants for which a State has adopted criteria and received EPA approval. The exceptions to this general rule are described in rules 10 and 11.

(10) For priority toxic pollutants where the State has adopted human health criteria and received EPA approval, but such criteria do not fully satisfy section 303(c)(2)(B) requirements, the rule includes human health criteria for such pollutants. For example, consider a case where a State has a water supply segment that poses an exposure risk to human health from both water and fish consumption. If the State has adopted, and received approval for, human health criteria based on water consumption only (e.g.,

Safe Drinking Water Act Maximum Contaminant Levels (MCLs)) which are less stringent than the "water + fish" criteria in Column D1 of § 131.36(b), the Column D1 criteria are promulgated for those water supply segments. The rationale for this is to ensure that both water and fish consumption exposure pathways are adequately addressed and human health is fully protected. If the State has adopted water consumption only criteria which are more stringent or equal to the Column D1 criteria, the "water + fish" criteria in Column D1 criteria are not promulgated.

(11) For priority toxic pollutants where the State has adopted aquatic life criteria and previous to the 1987 CWA Amendments received EPA approval, but such criteria do not fully satisfy section 303(c)(2)(B) requirements, the rule includes aquatic life criteria for such pollutants. For example, if the State has adopted not-to-be-exceeded aquatic life criteria which are less stringent than the 4-day average chronic aquatic life criteria in § 131.36(b) (i.e., in Columns B2 and C2), the acute and chronic aquatic life criteria in § 131.36(b) are promulgated for those pollutants. The rationale for this is that the State-adopted criteria do not protect resident aquatic life from both acute and chronic effects, and that Federal criteria are necessary to fully protect aquatic life designated uses. If the State has adopted not-to-be-exceeded aquatic life criteria which are more stringent or equal to the chronic aquatic life criteria in § 131.36(b), the acute and chronic aquatic life criteria in § 131.36(b) are not promulgated for those pollutants.

(12) Under certain conditions discussed in rules, 9, 10, and 11, criteria listed in § 131.36(b) are not promulgated for specific pollutants; however, EPA made such exceptions only for pollutants for which criteria have been adopted by the State and approved by EPA, where such criteria are currently effective under State law the appropriate EPA Region concluded that the State's criteria fully satisfy section 303(c)(2)(B) requirements.

3. Approach for States that Fully Comply Subsequent to Issuance of this Final Rule

As discussed in prior Sections of this Preamble, the water quality standards program has been established with an emphasis on State primacy. Although this rule was developed to Federally promulgate toxics criteria for States, EPA prefers that States maintain primacy, revise their own standards, and achieve full compliance. EPA is hopeful this rule will provide additional impetus for non-complying States to

adopt the criteria for priority toxic pollutants necessary to comply with section 303(c)(2)(B).

Removal of a State from the rule will require another rulemaking by EPA according to the requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). EPA will withdraw the Federal rule without a notice and comment rulemaking when the State adopts standards no less stringent than the Federal rule (i.e., standards which provide, at least, equivalent environmental and human health protection). For example, see 51 FR 11580, April 4, 1986, which finalized EPA's removal of a Federal rule for the State of Mississippi.

However, if a State adopts standards for toxics which are less stringent than the Federal rule but, in the Agency's judgment, fully meet the requirements of the Act, EPA will propose to withdraw the rule with a Notice of proposed rulemaking and provide for public participation. This procedure would be required for partial or complete removal of a State from this rulemaking. An exception to this requirement would be when a State adopts a human health criterion for a carcinogen at a 10^{-5} risk level where the Agency has promulgated at a 10^{-6} risk level. In such a case, the Agency believes it would be appropriate to withdraw the Federal criterion without notice and comment because the Agency has considered in this rule that criteria based on either 10^{-5} or 10^{-6} risk levels meet the requirements of the Act. A State covered by this final rule could adopt the necessary criteria using any of the three Options or combinations of those Options described in EPA's 1989 guidance.

EPA cautions States and the public that promulgation of this Federal rule removes most of the flexibility available to States for modifying their standards on a discharger-specific or stream-specific basis. For example, variances and site-specific criteria development are actions sometimes adopted by the States. These are optional policies under terms of the Federal water quality standards regulation. Except for the water-effect ratio for certain metals, EPA has not incorporated either optional policy, in general, in this rulemaking; that is, EPA has not generally authorized State modification of Federal water quality standards. Each of these types of modifications will, in general, require Federal rulemaking on a case-by-case basis to change the Federal rule. Because of the time consuming nature of reviewing such requests, limited Federal resources, and the need for the Agency to move into other priority programs

areas in establishing environmental controls, EPA alerts the States and the public that a prompt Agency response to requests for variances and site-specific modifications to the Federal criteria is unlikely. The best course of action, if such provisions are desired in a State, is for a State to adopt its own standards and take advantage, if it so chooses, of the flexibility offered by these optional provisions.

The Federal criteria published today are effective in 45 days. However, this action does not change existing applicable State and EPA provisions related to permit issuance or reissuance as they affect schedules of compliance. EPA and the States may continue issuing permits containing enforceable compliance schedules for these Federally established water quality standards if it is consistent with State policy.

F. Derivation of Criteria

1. Section 304(a) Criteria Process

Under the authority of CWA section 304(a), EPA has developed methodologies and specific criteria to protect aquatic life and human health. These methodologies are intended to provide protection for all surface water on a national basis. As described below, there are site-specific procedures for more precisely addressing site-specific conditions for an individual water body. However, the water quality criteria are scientifically sound and will achieve the statutory objective of protecting designated uses even in the absence of these modification procedures. Although the site-specific procedures may allow for more precise criteria for certain waterbodies, these procedures are infrequently used because the Section 304(a) criteria recommendations are designed to protect all waterbodies and have proven themselves to be appropriate. The methodologies have been subject to public review, as have the individual criteria documents. Additionally, the methodologies have been reviewed and approved by EPA's Science Advisory Board of external experts. Additional comments on the methodologies were taken as part of this action and have been considered and responded to in developing this final rule. In addition, these comments will be considered in the Agency's ongoing effort to propose revised methodologies for public review and comment in fiscal year 1993.

EPA incorporated by reference into the record of this rule the aquatic life methodology as described in "Appendix B—Guidelines for Deriving Water Quality Criteria for the Protection of

Aquatic Life and Its Uses" (45 FR 79341, November 28, 1980) as amended by "Summary of Revisions to Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" (50 FR 30792, July 29, 1985).

Note: Throughout the remainder of this rule, this reference is described as the 1985 Guidelines. Any page number references are to the actual guidance document, not the notice of availability in the *Federal Register*. The actual guidelines document was available through the National Technical Information Service (PB85-227049), is in the record of this rulemaking, and is abstracted in Appendix A of Quality Criteria for Water, 1986.

EPA also incorporated by reference into the record of this rule the human health methodology as described in "Appendix C—Guidelines and Methodology Used in the Preparation of Health Effects Assessment Chapters of the Consent Decree Water Criteria Documents" (45 FR 79347, November 28, 1980).

Note: Throughout the remainder of this Preamble, this reference is described as the Human Health Guidelines or the 1980 Guidelines.

EPA also recommends that the following be reviewed: "Appendix D—Response to Comments on Guidelines for Deriving Water Quality Criteria for the Protection of Aquatic Life and Its Uses," (45 FR 79357, November 28, 1980); "Appendix E—Responses to Public Comments on the Human Health Effects Methodology for Deriving Ambient Water Quality Criteria" (45 FR 79368, November 28, 1980); and "Appendix B—Response to Comments on Guidelines for Deriving Numerical National Water quality Criteria for the Protection of Aquatic Organisms and Their Uses" (50 FR 30793, July 29, 1985). EPA also placed into the record the most current individual criteria documents for the priority toxic pollutants included in today's rule.

The primary focus of this rule is the inclusions of the water quality criteria for pollutant(s) in State standards as necessary to support water quality-based control programs. The Agency accepted comment on the criteria proposed for inclusion in this rule. However, Congress established a very ambitious schedule for the promulgation of the final criteria. The statutory deadline in section 303(c)(4) clearly indicates that Congress intended the Agency to move very expeditiously when Federal action is warranted.

The methodology used to develop the criteria and the criteria themselves (to the extent not updated through IRIS) have previously undergone scientific peer review and public review and

comment, and have been revised as appropriate. For the most part, this review occurred before Congress amended the Act in 1987, to require the inclusion of numeric criteria for certain toxic pollutants in State standards. Congress acted with full knowledge of the EPA process for developing criteria and the Agency's recommendations under section 304(a). EPA believes it is consistent with Congressional intent to rely in large part on existing criteria rather than engage in a time-consuming reevaluation of the underlying basis for water quality criteria. Accordingly, the Agency stands by its prior decisions regarding its published methodology and criteria even after review of the comments received. It is the Agency's belief that this approach will best achieve the purpose of moving forward in promulgating criteria for States not in compliance with section 303(c)(2)(B) so that environmental controls intended by Congress can be put into place to protect public health and welfare and enhance water quality.

It should be noted that the Agency is initiating a review of the basic guidelines for developing criteria and that comments received during this rulemaking will be considered in that effort. Future revisions to the criteria guidelines will be reviewed by the Agency's Science Advisory Board and submitted to the public for review and comment following the same process that was used in issuing the existing methodological guidelines. Subsequent revisions of criteria documents and the issuance of any new criteria documents will also be subject to the public review.

2. Aquatic Life Criteria

Aquatic life criteria may be expressed in numeric or narrative forms. EPA's 1985 Guidelines describe an objective, internally consistent and appropriate way of deriving chemical-specific, numeric water quality criteria for the protection of the presence of, as well as the uses of, both fresh and marine water aquatic organisms.

An aquatic life criterion derived using EPA's section 304(a) method "might be thought of as an estimate of the highest concentration of a substance in water which does not present a significant risk to the aquatic organisms in the water and their uses." (45 FR 79341.) The term "their uses" refers to consumption by humans and wildlife (1985 Guidelines, page 48). EPA's guidelines are designed to derive criteria that protect aquatic communities by protecting most of the species and their uses most of the time, but not necessarily all of the species all of the time (1985 Guidelines, page 1). Aquatic communities can tolerate some

stress and occasional adverse effects on a few species so that total protection of all species all of the time is not necessary. EPA's 1985 Guidelines attempt to provide a reasonable and adequate amount of protection with only a small possibility of substantial overprotection or underprotection. As discussed in detail below, there are several individual factors which may make the criteria somewhat overprotective or underprotective. The approach EPA is using is believed to be as well balanced as possible, given the state of the science.

Numerical aquatic life criteria derived using EPA's 1985 Guidelines are expressed as short-term and long-term numbers, rather than one number, in order that the criteria more accurately reflect toxicological and practical realities. The combination of a criteria maximum concentration (CMC), a one-hour average acute limit, and a criteria continuous concentration (CCC), a four-day average concentration chronic limit, provide protection of aquatic life and its uses from acute and chronic toxicity to animals and plants, and from bioconcentration by aquatic organisms, without being as restrictive as a one-number criterion would have to be. (1985 Guidelines, pages 4-5.)

The two-number criteria are intended to identify average pollutant concentrations which will produce water quality generally suited to maintenance of aquatic life and their uses while restricting the duration of excursions over the average so that total exposures will not cause unacceptable adverse effects. Merely specifying an average value over a time period is insufficient unless the time period is short, because excursions higher than the average can kill or cause substantial damage in short periods.

A minimum data set of eight specified families is required for criteria development (details are given in the 1985 Guidelines, page 22). The eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. States may develop site-specific criteria using native species, provided that the broad spectrum represented by the eight families is maintained. All aquatic organisms and their common uses are meant to be considered, but not necessarily protected, if relevant data are available.

EPA's application of guidelines to develop the criteria matrix in the final rule is judged by the Agency to be applicable to all waters of the United States, and to all ecosystems (1985

Guidelines, page 4). There are waters and ecosystems where site-specific criteria could be developed, as discussed below, but it is up to States to identify those waters and develop the appropriate site-specific criteria.

Fresh water and salt water (including both estuarine and marine waters) have different chemical compositions, and freshwater and saltwater species rarely inhabit the same water simultaneously. To provide additional accuracy, criteria developed recently are developed for fresh water and for salt water.

Assumptions which may make the criteria underprotective include the fact that not all species are protected, the use of criteria on an individual basis, with no consideration of additive or synergistic effects, and the general lack of consideration of impacts on wildlife, due principally to a lack of data. Chemical toxicity is often related to certain receiving water characteristics, (pH, hardness, etc.) of a waterbody. Adoption of some criteria without consideration of these parameters could result in the criteria being overprotective.

3. Criteria for Human Health

EPA's section 304(a) human health guidelines attempt to provide criteria which minimize or specify the potential risk of adverse human effects due to substances in ambient water (45 FR 79347). EPA's section 304(a) criteria for human health are based on two types of biological endpoints: (1) Carcinogenicity and (2) systemic toxicity (i.e., all other adverse effects other than cancer). Thus, there are two procedures for assessing these health effects: one for carcinogens and one for non-carcinogens.

EPA's human health guidelines assume that carcinogenicity is a "non-threshold phenomenon," that is, there are no "safe" or "no-effect levels" because even extremely small doses are assumed to cause a finite increase in the incidence of the response (i.e., cancer). Therefore, EPA's water quality criteria for carcinogens are presented as pollutant concentrations corresponding to increases in the risk of developing cancer.

For pollutants that do not manifest any apparent carcinogenic effects in animal studies (i.e., systemic toxicants), EPA assumes that the pollutant has a threshold below which no effects will be observed. This assumption is based on the premise that a physiological mechanism exists within living organisms to avoid or overcome the adverse effects of the pollutant below the threshold concentration.

The human health risks of a substance cannot be determined with any degree

of confidence unless dose-response relationships are quantified. Therefore, a dose-response assessment is required before a criterion can be calculated. The dose-response assessment determines the quantitative relationships between the amount of exposure to a substance and the onset of toxic injury or disease. Data for determining dose-response relationships are typically derived from animal studies, or less frequently, from epidemiological studies in exposed populations.

The dose-response information needed for carcinogens is an estimate of the carcinogenic potency of the compound. Carcinogenic potency is defined here as a general term for a chemical's human cancer-causing potential. This term is often used loosely to refer to the more specific carcinogenic or cancer slope factor which is defined as an estimate of carcinogenic potency derived from animal studies or epidemiological data of human exposure. It is based on extrapolation from test exposures of high dose levels over relatively short periods of time to more realistic low dose levels over a lifetime exposure period by use of linear extrapolation models. The cancer slope factor, q_1^* , is EPA's estimate of carcinogenic potency and is intended to be a conservative upper bound estimate (e.g. 95% upper bound confidence limit).

For non-carcinogens, EPA uses the reference dose (RfD) as the dose response parameter in calculating the criteria. The RfD was formerly referred to as an "Acceptable Daily Intake" or ADI. The RfD is useful as a reference point for gauging the potential effects of other doses. Doses that are less than the RfD are not likely to be associated with any health risks, and are therefore less likely to be of regulatory concern. As the frequency of exposures exceeding the RfD increases and as the size of the excess increases, the probability increases that adverse effects may be observed in a human population. Nonetheless, a clear conclusion cannot be categorically drawn that all doses below the RfD are "acceptable" and that all doses in excess of the RfD are "unacceptable." In extrapolating non-carcinogen animal test data to humans to derive an RfD, EPA divides a no-observed-effect dose observed in animal studies by an "uncertainty factor" which is based on profession judgment of toxicologists and typically ranges from 10 to 10,000.

For section 304(a) criteria development, EPA typically considers only exposures to a pollutant that occur through the ingestion of water and contaminated fish and shellfish. This is

the exposure default assumption although the human health guidelines provide for considering other sources where data are available (see 45 FR 79354). Thus the criteria are based on an assessment of risks related to the surface water exposure route only.

The assumed exposure pathways in calculating the criteria are the consumption of 2 liters per day at the criteria concentration and the consumption of 6.5 grams per day of fish/shellfish contaminated at a level equal to the criteria concentration but multiplied by a "bioconcentration factor." The use of fish consumption as an exposure factor requires the quantification of pollutant residues in the edible portions of the ingested species. Bioconcentration factors (BCFs) are used to related pollutant residues in aquatic organisms to the pollutant concentration in ambient waters. BCFs are quantified by various procedures depending on the lipid solubility of the pollutant. For lipid soluble pollutants, the average BCF is calculated from the weighted average percent lipids in the edible portions of fish/shellfish, which is about 3%; or it is calculated from theoretical considerations using the octanol/water partition coefficient. For non-lipid soluble compounds, the BCF is determined empirically. The assumed water consumption is taken from the National Academy of Sciences publication "Drinking Water and Health" (1977). (Referenced in Human Health Guidelines, 45 FR 79356). The 6.5 grams per day contaminated fish consumption value is equivalent to the average per-capita consumption rate of all (contaminated and non-contaminated) freshwater and estuarine fish for the U.S. population. (See Human Health Guidelines, 45 FR 79348.)

EPA also assumes in calculating water quality criteria that the exposed individual is an average adult with body weight of 70 kilograms. The issue of concern is dose per kilogram of body weight. EPA assumes 6.5 grams per day of contaminated fish consumption and 2 liters per day of contaminated drinking water consumption for a 70 kilogram person in calculating the criteria. Persons of smaller body weight are expected to ingest less contaminated fish and water, so the dose per kilogram of body weight is generally expected to be roughly comparable. There may be subpopulations within a State, such as subsistence fishermen, who as a result of greater exposure to a contaminant, are at greater risk than the hypothetical 70 kilogram person eating 6.5 grams per day of maximally contaminated fish and shellfish and drinking 2 liters per day of

maximally contaminated drinking water.

For example, individuals that ingest ten times more of a pollutant than is assumed in derivation of the criteria at a 10^{-6} risk level will be protected to a 10^{-3} level, which EPA has historically considered to be adequately protective. There may, nevertheless, be circumstances where site-specific numeric criteria that are more stringent than the State-wide criteria are necessary to adequately protect highly exposed subpopulations. Although EPA intends to focus on promulgation of appropriate State-wide criteria that will reduce risks to all exposed individuals, including highly exposed subpopulations, site-specific criteria may be developed subsequently by EPA or the States where warranted to provide necessary additional protection. (See Human Health Guidelines, Issue 8, 45 FR 79369.)

For non-carcinogens, oral RfD assessments (hereinafter simply "RfDs") are developed based on pollutant concentrations that cause threshold effects. The RfD is an estimate (with uncertainty spanning perhaps an order of magnitude) of a daily exposure to the human population (including sensitive subgroups) that is likely to be without appreciable risk of deleterious effects during a lifetime. (See Human Health Guidelines, 45 FR 79348.)

Criteria are calculated for individual chemicals with no consideration of additive, synergistic or antagonistic effects in mixtures. If the conditions within a State differ from the assumptions EPA used within the constraints of the Federal rule, the States have the option to perform the analyses for their conditions.

EPA has a process to develop a scientific consensus on oral reference dose assessments and carcinogenicity assessments (hereinafter simply cancer slope factors or slope factors). Reference doses and slope factors are validated by two Agency work groups (i.e., one work group for each) which are composed of senior Agency scientists from all of the program offices and the Office of Research and Development. These work groups develop a consensus of Agency opinion for RfDs and slope factors which are then used throughout the Agency for consistent regulation and guidance development. EPA maintains an electronic data base which contains the official Agency consensus for oral RfD assessments and carcinogenicity assessments which is known as the Integrated Risk Information System (IRIS). It is available for use by the public on the National Institutes of Health's National Library of Medicine's

TOXNET system, and through diskettes from the National Technical Information Service (NTIS). (NTIS access number is PB 90-591330).

For the criteria included in today's rule, EPA used the criteria recommendation from the appropriate Section 304(a) criteria document. (The availability of EPA's criteria documents has been announced in various Federal Register Notices. These documents are also placed in the record for today's rule.) However, if the Agency has changed any parameters in IRIS used in criteria derivation since issuance of the criteria guidance document, EPA recalculated the criteria recommendation with the latest information, invited comment on the updating procedure and the numbers that would be derived from it. (This information is included in the record.) Thus, there may be differences between the original criteria guidance document recommendation, and those in this rule, but this rule presents the Agency's most current section 304(a) criteria recommendation. The recalculated human health numbers are denoted by an "a" in the criteria matrix in subsection 131.36(b) of today's rule.

A difficult and controversial problem facing both the States and EPA in attempting to comply with the requirements of section 303(c)(2)(B) involved selecting a criterion for 2,3,7,8-TCDD (dioxin). EPA, the States, dischargers, environmental groups and the public at large have been involved in discussions concerning the ambient level of protection that is protective of public health. At issue during the State debates on selecting criterion for dioxin and in comments to this rulemaking are scientific questions specific to dioxin such as determining the carcinogenic potency of the pollutant and the extent to which the pollutant tends to accumulate in fish tissues. Other issues are raised that are more generic to EPA's human health criteria. Most of these issues relate, directly or indirectly, to concerns expressed by dischargers regarding the cost of complying with water quality-based effluent limits for dioxin.

In order to base its regulatory decisions on the best available science, EPA continuously updates its assessment of the risk from exposure to contaminants. On September 11, 1991, EPA's Office of Research and Development (ORD) began reassessing the scientific models and exposure scenarios used to predict the risks of biological effects from exposure to low levels of dioxin. This reassessment has the potential to alter the risk assessment for dioxin and accordingly the Agency's

regulatory decisions related to dioxin. At this time, EPA is unable to say with any certainty what the degree or directions of any changes in risk estimates might be. Moreover, the results of the assessment and any potential impact on the criteria limit will not be known for quite some time.

Considerable comment was received that the Agency not include dioxin in the rule pending the results of the dioxin reassessment. However, no additional data was submitted by the commenters that adds to the information available upon which to make a decision. Based on information currently available to the Agency and in the face of known uncertainties, the limit promulgated today is within the range of scientific defensibility.

A State may adopt a different limit subsequent to this rule, following the normal procedures for adopting or revising water quality standards (40 FR 131). The adoption by a State of a new or revised criterion for dioxin, whether more or less stringent than the existing section 304(a) guidance, will be accepted by the Agency based on the results of the Agency's reassessment without any further justification. Once a State adopts a new dioxin criterion, the permitting authority, either EPA or the State (if authorized to administer a permit program), may change the effluent limitation for dioxin in a permit subject to the antibacksliding requirements of sections 402(o) and 303(d)(4) of the CWA and the antidegradation policy of the State.

This final rule includes criteria for dioxin. This action encourages and supports the ongoing efforts of fourteen States actively considering adopting criteria for dioxin. Most of these States are relying on the same data used by EPA in deriving its criterion for dioxin. In addition, dioxin limits are included as appropriate in Individual Control Strategies (ICS's) developed under section 304(l), so there should be no immediate regulatory action that will be based upon the promulgation of Federal criteria.

Moreover, as discussed in more detail in Section J, Executive Order 12291, example 5, it is unlikely that the practical impact of including dioxin at the 0.013 ppq level in this rule will affect the need for treatment and thus, is unlikely to be the basis for any incremental costs for pulp and paper mills to reduce dioxin discharges.

4. Section 304(a) Human Health Criteria Excluded

Today's rule does not contain certain of the section 304(a) criteria for priority toxic pollutants because those criteria

were not based on toxicity. The basis for these particular criteria are organoleptic effects (e.g., taste and odor) which would make water and edible aquatic life unpalatable but not toxic. Because the basis for this rule is to protect the public health and aquatic life from toxicity consistent with the language and intent in section 303(c)(2)(B), EPA is promulgating criteria only for those priority toxic pollutants whose criteria recommendations are based on toxicity. The Section 304(a) human health criteria based on organoleptic effects for copper, zinc, 2,4-dimethylphenol, and 3-methyl-4-chlorophenol are excluded for this reason.

5. Cancer Risk Level

EPA's section 304(a) criteria guidance documents for priority toxic pollutants that are based on carcinogenicity present concentrations for upper bound risk levels of 1 excess cancer per 100,000 people (10^{-5}), per 1,000,000 people (10^{-6}), and per 10,000,000 people (10^{-7}). However, the criteria documents do not recommend a particular risk level as EPA policy.

In the April, 1990, Federal Register notice of preliminary assessment of State compliance, EPA announced its intention to propose this rule with an incremental cancer risk level of one in a million (10^{-6}) for all priority toxic pollutants regulated as carcinogens (55 FR 14351). This risk level was in fact proposed in the November 19, 1991 Federal Register Notice of proposed rulemaking. However, EPA's Office of Water's guidance to the States has consistently reflected the Agency's policy of accepting cancer risk policies from the States in the range of 10^{-6} to 10^{-4} (see 45 FR 79323, November 28, 1980; Guidance for State Implementation of Water Quality Standards for CWA section 303(c)(2)(B), November 12, 1988 (54 FR 346); see also document described in footnote 3 of this preamble). EPA reviews individual State policies as part of its water quality standards oversight function and determines if States have appropriately consulted their citizenry and applied good science in adopting water quality criteria.

In the proposal, EPA not only sought public comment on its decision to propose criteria based on a 10^{-6} risk level, but also specifically solicited comment on an alternate risk level of 10^{-5} . EPA received extensive comments that the proposed application of the criteria at the 10^{-6} risk level was contrary to Agency policy, contradicted other risk levels accepted by EPA in States included in the proposal, oversteps EPA authority by failing to

recognize that such a decision more properly should be a State decision, given their primary authority to establish water quality standards, and that EPA should not include a risk level in the final rule.

Upon consideration of these comments, EPA agrees that establishing a single risk level for all States departs from Agency policy in the standards program. The application of the human health criteria in today's rule, on a State-by-State basis, therefore, has been changed. In today's rule, the risk level for each State is based on the best information available to the Agency as to each State's policy or practice regarding what risk level is, or should be, used in regulating carcinogens in surface waters. In most cases the risk levels were based on a State-adopted or formally proposed risk level; or in the case of Idaho, Rhode Island, and Nevada on an expression of State policy preference. EPA is therefore promulgating criteria at either the 10^{-5} or 10^{-6} risk level, either of which is consistent with EPA policy and with the requirements of the Clean Water Act.

The Agency recognizes that it made some of its decisions regarding the appropriate risk level on limited data. However, in the time available to the Agency, we relied on the best available information. The Agency believes it is important to move forward with this rule based on available information. To ensure that the Agency has selected the appropriate risk level for each State, the Agency is providing a final opportunity for the Governor of each State (or other official with authority to determine risk levels with respect to water quality criteria) to inform EPA if they believe a different risk level should be selected for their State.

Today's regulation will become effective 45 days from publication in the Federal Register. However, if within 30 days of publication of this rule in the Federal Register, the Governor or other appropriate official determines that the final rule is not based on the correct State policy or practice with regard to risk levels, the Governor (or other appropriate official) may request the Administrator in writing to adopt a different risk level for the State.

Note: The Governor is not constrained to requesting the Administrator to adopt a single risk level for all carcinogenic compounds. It is also acceptable for a State to select more than one risk level. For example, New Jersey is proposing to adopt 10^{-6} for Class A and B carcinogens, and 10^{-5} for Class C carcinogens. In this rule, EPA is promulgating the two risk level concept for New Jersey. The Governor must explain the basis for the request to change the risk level.

If EPA determines, after receipt of such a letter from the Governor or other appropriate State official, the State's preference is consistent with EPA policy, as set out in this rulemaking, and the requirements of the Clean Water Act, EPA will amend the rule accordingly.

As noted above, in this rulemaking EPA is adopting risk levels that it believes best reflects the expressed preferences of the covered States (10^{-6} or 10^{-5} for all carcinogens). If there were, however, no clear expression of preference by a State, EPA also believes it is reasonable for States to adopt a risk level of 10^{-5} for many of the covered carcinogens and a more stringent risk level of 10^{-6} for those carcinogens with substantially higher bioconcentration factors. Recognizing the current limitations of the scientific data available for this rulemaking, EPA believes it would be reasonable to conclude that carcinogens that bioaccumulate, particularly given the exposure of fishermen to such carcinogens, may justify a more protective risk level of 10^{-6} for the average fish consumer, but for other carcinogens a less conservative level (10^{-5}) may be appropriate.

6. Applying EPA's Nationally Derived Criteria to State Waters

To assist States in modifying EPA's water quality criteria, the Agency has provided guidance on developing site specific criteria for aquatic life and human health (see Chapter 4, Water Quality Standards Handbook, Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses, and the Guidelines and Methodology Used in the Preparation of Health Effect Assessment Chapters of the Consent Decree Water Criteria Documents). This guidance can be used by the appropriate regulatory authority to develop alternative criteria. Where such criteria are more stringent than the criteria promulgated today, Section 510 of the Clean Water Act (33 U.S.C. 1370) allows their implementation and enforcement in lieu of today's promulgated criteria.

EPA's experience with such site-specific criteria has verified that the national criteria are generally protective and appropriate for direct use by the States. (See Response to Comments on the 1985 Aquatic Life Guidelines, Comment 57, 50 FR 30796, July 29, 1985.)

7. Application of Metals Criteria

A substantial number of comments were received requesting Agency

guidance on the implementation of metals criteria for aquatic life. In response, the Agency has prepared guidance on this issue, which is described in general terms below, and which is being applied to the metals criteria being promulgated today. Responses to individual comments may be found in section I, comments 19 to 53.

In selecting an approach for implementing the metals criteria, the principal issue is the correlation between metals that are measured and metals that are biologically available and toxic, as discussed more fully in EPA's Interim Guidance on Interpretation and Implementation of Aquatic Life Criteria for Metals, U.S. EPA, 1992, Office of Science and Technology, May 1992. (Notice of availability published at 57 FR 24041, June 5, 1992.)

In order to assure that the metals criteria are appropriate for the chemical conditions under which they are applied, EPA is promulgating the criteria in terms of total recoverable metal and providing for adjustment of the criteria through application of the "water-effect ratio" procedure as described and recommended in the above Guidance document. This procedure was developed in the early 1980's, and was originally set forth, along with several case study applications, as the Indicator Species procedure in Chapter 4 of the Water Quality Standards Handbook (U.S. EPA 1983 at page 4-12). EPA notes that performing the testing to use site-specific water-effect ratios is optional on the part of the States.

In natural waters metals may exist in a variety of dissolved and particulate forms. The bioavailability and toxicity of metals depend strongly on the exact physical and chemical form of the metal. Generally, dissolved metal has greater toxicity than particulate metal, and for some metals, such as copper, certain dissolved forms have greater toxicity than other dissolved forms. Because the speciation among the various forms of a particular metal may vary from place to place, the same metal concentration may cause different toxicity from place to place.

With one exception (selenium), EPA's metals criteria for aquatic life protection are developed from laboratory toxicity data. Use of laboratory toxicity testing is usually much more cost-effective for obtaining data on (1) the toxicity of substances to a variety of species, and (2) the effect of various water quality characteristics on toxicity. (See 1980 Aquatic Life guidelines, comment 21, 45 FR 79360. See also responses to

comments 17, 18, 19, 20.) The dilution water used in laboratory toxicity tests is ordinarily low in particulate matter (i.e. suspended solids), and low in organic matter compared to many ambient waters. As a result, laboratory toxicity tests are ordinarily more likely to overestimate the toxicity than underestimate the toxicity of metals in some ambient waters, particularly fresh waters.

Because of the complexity of metals speciation and its effect on toxicity, the relationship between measured concentrations and toxicity is not precise. Consequently, any method that could be recommended would not guarantee precise comparability between concentrations measured in the field and concentrations employed in the toxicity tests underlying the criteria.

For metals criteria derived from laboratory toxicity tests, the best approach is to use a biological method to compare bioavailability and toxicity in receiving waters versus laboratory test waters (the water-effect ratio) and to adjust the criteria values accordingly. This involves running toxicity tests for at least two species, each preferably from a different family, measuring acute (and possibly chronic) toxicity values for the pollutant using (a) the local receiving water, and (b) standard laboratory toxicity testing water, which is also the source of toxicity test dilution water. A water-effect ratio is the acute (or chronic) value in site water divided by the acute (or chronic) value in standard laboratory water. An acute value is an LC50 from a 48-96 hour test, as appropriate for the species. A chronic value is a concentration resulting from hypothesis testing or regression analysis of measurements of survival, growth, or reproduction in life cycle, partial life cycle, or early life stage tests on aquatic species.

Chemical approaches for defining and comparing bioavailable metal are subject to greater uncertainty than the above biological approach.

Chemical approaches, such as dissolved and total recoverable metals are easier to apply than biological approaches. One approach that EPA has approved in State standards is to measure metals in ambient waters in terms of dissolved metal, and to compare such measurements to criteria appropriate for dissolved metal. Since effluent limits, for both technical and legal (see NPDES permits regulation, 40 CFR 122.45) reasons, should be expressed in terms of total recoverable metal, it is necessary to translate between the dissolved and total recoverable concentrations. EPA has not incorporated the alternative of dissolved

metals criteria into this rule, because the use of the water-effect ratio accomplishes the same ends but is technically superior and subject to fewer uncertainties than implementation of the criteria as dissolved concentrations.

The simplest approach for ambient metals standards is the use of the total recoverable analytical method without a water-effect ratio adjustment. This is a reasonable, albeit environmentally conservative strategy, for applying EPA's aquatic life criteria. Where the toxicity testing necessary to develop an alternative water-effect ratio has not been performed, this rule will apply the total recoverable analytical method without a water-effect ratio adjustment. This occurs because EPA assigns the water-effect ratio a value of 1.0, subject to being rebutted by toxicity testing results.

Because of the comments received, and because of the desire to achieve the greatest possible degree of accuracy, EPA has chosen to apply the total recoverable metals criteria unadjusted for site-specific water chemistry, unless the State adjusts the criteria through the use of a water-effect ratio as provided for in this rule. Allowance for water-effect ratio adjustment also satisfies the concerns of comments requesting consideration of dissolved criteria.

The water-effect ratio approach compares bioavailability and toxicity of a specific pollutant in receiving waters and in laboratory test waters. It involves running toxicity tests for at least two species an appropriate number of times, as determined by the States, ordinarily on samples collected in at least two seasons (or more where large metal loadings are involved). As with other site-specific procedures, the basic analysis or testing may be performed by the State, a permittee, or any other interested party. Acute or chronic toxicity for the pollutant are measured using (a) the local receiving water where the criterion is being implemented, and (b) standard laboratory toxicity testing water, as the sources of toxicity test dilution water. The water-effect ratio is calculated as the acute or chronic value in site water divided by respective acute or chronic values in standard laboratory water. Ordinarily, the geometric mean water-effect ratio from the valid tests is used for calculation of the criterion, except where protection of sensitive species requires a more stringent value. Because the metal's toxicity in standard laboratory water is the basis for EPA's criterion, this comparison is used to adjust the national criterion to a site-specific value. Because the procedure is a biological measure of differences in

water chemistry, the water-effect ratio, even when derived from acute tests, usually may be assumed to also apply to chronic criteria.

For criteria that do not vary with hardness, the criterion for a specific site equals the acute or chronic value tabulated in the rule (i.e., the matrix in 40 CFR 131.36(b)) multiplied by the site-specific water-effect ratio for that pollutant. The result may either reduce or increase the stringency of the criteria.

For criteria whose toxicity varies with hardness, the criterion for a specific site equals the criterion calculated at the design hardness (see 40 CFR 131.36(c)(4)), multiplied by the site-specific water-effect ratio.

The water-effect ratio is assigned a value of 1.0, unless scientifically defensible data clearly demonstrate that a value less than 1.0 is necessary or a value greater than 1.0 is sufficient to fully protect the designated uses of the water body from the toxic effects of the pollutant. Any data accepted for calculation of the water-effect ratio is to be generated through standard toxicity testing protocols (EPA recommends the methodology in Annual Book of ASTM Stds. 1991. Vol 11.04. ASTM.

Philadelphia, PA.), using sampled ambient water representative of conditions in the affected water body, and using laboratory dilution water comparable to that used in toxicity tests underlying the criteria. The guidance documents cited at the beginning of this section provides more guidance on generating the information necessary to determine the correct value of the water-effect ratio. However, EPA intends within the next few months to provide additional guidance or performing the analyses necessary to develop scientifically defensible water-effect ratios for metals. As envisioned at this time, EPA will expand Chapter 4 in the Handbook to apply the appropriate procedures described there specifically to metals. EPA will look at the chemical characteristics of the laboratory water used in the toxicity tests included in the metals criteria data base, appropriate test organisms, analytical methods, safeguards against unintended metals contamination during toxicity testing, and appropriate data handling and statistics. While EPA believes the current guidance is adequate for application of the water-effect ratio, the additional guidance should help standardize procedures and make results more comparable and defensible.

The rule as promulgated is constructed as a rebuttable presumption. The water-effect ratio is assigned a value of 1.0 but provides that a State may assign a different value

derived from suitable tests. As EPA has noted elsewhere, the actual decision as to the numeric value assigned to a water-effect ratio may be made during a State or EPA NPDES permit proceeding provided that adequate notice and opportunity for public participation is provided. It is the responsibility of the permit writing authority to determine whether to apply the water-effect ratio in an NPDES permit. However, EPA believes use of the ratio will lead to more appropriate permit limits. States may wish to allow permittees to fund State-administered studies necessary to develop the ratio for particular waterbodies.

EPA reviews State issued NPDES permits. To facilitate EPA consideration of a State-developed water-effect ratio, a State should specify in documentation supporting that action what decisions were made for critical parameters such as toxicity testing protocols used, frequency of testing, critical periods for sampling and testing, and analytical quality control and assurance. Each of the factors must be articulated in a record as a basis for a determination that the water-effect ratio is scientifically defensible.

The procedure applies only to aquatic life criteria derived from laboratory toxicity data. That is, it applies to the acute and chronic criteria (Columns B and C in 40 CFR 131.36(b)) for arsenic, cadmium, chromium, copper, lead, nickel, and zinc. It also applies to the acute criteria for mercury and silver, and the saltwater acute and chronic criteria for selenium. It does not apply to the chronic criteria for mercury, because they are residue based, or to the freshwater acute and chronic criteria for selenium, because they are field based.

The water-effect ratio is affected not only by speciation among the various dissolved and particulate forms, but also by additive, synergistic, and antagonistic effects of other materials in the affected site waters. As such, the water-effect ratio is a rather comprehensive measure of the effect of water chemistry on the toxicity of a pollutant. Because the procedure accounts for any reduction in bioavailability resulting from binding of the metal to particulate matter, all metals criteria have been appropriately expressed as total recoverable metal in this rule.

Where measured water-effect ratios are used in deriving NPDES permit limits, data from appropriate testing during the term of the permit should be accumulated so that the value of the water-effect ratio can be reevaluated each time the permit is reissued. Thus, where measured water-effect ratios are

involved, EPA recommends that NPDES permits establish monitoring requirements that include periodic determinations of water-effect ratios.

G. Description of the Final Rule and Changes From Proposal

1. Changes From Proposal

Several changes were made in the final rule from the proposal both as a result of Agency and State action with respect to the ongoing adoption of water quality standards by the States and because of the Agency's consideration of issues raised in specific public comments.

The States of Arizona, Colorado, Connecticut, Louisiana, New Hampshire, Virginia, the Commonwealth of the Northern Mariana Islands, and Hawaii are not included in the final rule as their standards were duly adopted and approved by EPA as fully meeting the requirements of section 303(c)(2)(B). Arizona's water quality standards were approved on March 2, 1992; Colorado's standards were approved by EPA on December 10, 1991; Connecticut on May 15, 1992; Louisiana on January 24, 1992; New Hampshire on June 25, 1992; Virginia on June 30, 1992; CNMI on January 13, 1992; and Hawaii on November 4, 1992. Copies of the approval letters are included in the record to this final rulemaking.

In addition, human health criteria adopted by the State of Arkansas were approved by EPA on January 24, 1992, and such criteria were removed from today's rule as it affects Arkansas. EPA is not promulgating an aquatic life criterion in Arkansas for arsenic because a review of monitoring data from 1985 to the present reveals no reason to conclude that arsenic will interfere with designated aquatic life uses. Additional details on EPA's action with respect to Arkansas may be found in Section I—Response to Public Comments, subsection 6.

Except for dioxin, criteria for the State of Florida for both human health and protection of aquatic life were approved by EPA on February 25, 1992. Florida is included in the rule only for the purposes of establishing a criterion for dioxin. More details on Florida's action are included in the Florida section of subsection 6 of the Response to Comments section of this preamble.

The criteria applicable to California have been revised to reflect a partial approval of the State's water quality standards on November 6, 1991. Additional comments with respect to California may be found in subsection 6

of Section I—Response to Public Comments.

The rule as it applies to the State of Washington was revised after discussion with the State as to EPA's interpretation of the uses designated by the State. The rule is now based on use categories rather than use classes. Additional details on this change may be found in subsection 6 of Section I—Response to Public Comments.

The rule as it applies to Alaska was modified to delete the assignment of criteria to a seafood processing use. This use falls under the standards program. However, because it applies to food preparation only, it is not appropriate to apply to it aquatic life or human health criteria. Additional aquatic life and human health criteria were added to several use classifications after discussions with the State clarified the State's use classifications. Additional details on this change may be found in subsection 6 of Section I—Response to Public Comments.

The rule as it applies to Idaho was modified to add additional criteria for the protection of primary contact recreation after discussions with the State concerning that use. Additional details may be found in subsection 6 of Section I—Response to Public Comments.

The rule as it applies to Kansas was changed by removing the promulgation of silver for sections (2) (A), (B), (C), and (6)(C) as the State has an EPA approved aquatic life criterion more stringent than the EPA criterion. The human health criterion for silver was removed because EPA has withdrawn its silver human health criterion.

The rule as it applies to New Jersey was revised to reflect comments received from the New Jersey Department of Environmental Protection and Energy to add waters classified as Pinelands and to extend coverage of the criteria to the mainstem Delaware River and Delaware Bay (zones 1C-6). Additional details on this change may be found in subsection 6 of Section I—Response to Public Comments.

Clarifications on several aspects of the rule with respect to implementation procedures are addressed in the response to public comments section of this preamble (section I).

Language was added in § 131.36(c)(4) dealing with the application of metals criteria as discussed in section F-7 of this preamble. We also added requirements to clarify how hardness should be handled in doing water-effect ratio determinations (see 131.36(c)(4)(iii), footnotes "e" and "m" to 131.36(b)).

The criteria for carcinogenic compounds included in this rule are applied at a risk level based on State preference as reflected by adopted or proposed standards, or in the case of Idaho, Nevada, and Rhode Island, on expression of State policy preference, rather than at an across-the-board 10^{-6} risk level as was proposed by the Agency. The rationale for this change is discussed in detail in section F-5 and there is additional discussion in the Response to Public Comment Section. The basis for EPA's selection of a risk level for an individual State is described in the following paragraphs:

Alaska: Risk Level: 10^{-5}

In July 1992, the State proposed human health water quality based on achieving a 10^{-5} risk level for two carcinogens: Dioxin and chloroform. Also, on November 16, 1992, the Commissioner of the Alaska Department of Environmental Conservation wrote the Director, Water Division, in EPA Region X, and indicated that ". . . I also had this matter reviewed by our Attorney General's Office, and hereby confirm the appropriateness of utilizing a 10^{-5} risk level for Alaska in the National Toxics Rule."

California: Risk Level: 10^{-6}

Standards adopted by the State contained in the Enclosed Bays and Estuaries Plan, and the Inland Surface Waters Plan, approved by EPA on November 6, 1991, and the Ocean Plan approved by EPA on June 28, 1990, contain a risk level of 10^{-6} for carcinogens. The total number of toxic pollutants differs in each plan but approximately 60-65 pollutants are covered.

District of Columbia: Risk Level: 10^{-6}

In 1985 the District adopted water quality criteria for human health, based solely on exposure through water consumption. The criteria were based on a 10^{-6} risk level. See D.C.M.R. title 21, chapter 1102.8(I).

Florida: Risk Level: 10^{-6}

The State adopted human health criteria for all toxic pollutants, except dioxin, and received EPA approval on February 25, 1992, at a risk level of 10^{-6} .

Idaho: Risk Level: 10^{-6}

On November 12, 1992, the Administrator of the Division of Environmental Quality, Idaho Department of Health and Welfare, indicated in a letter to the EPA Assistant Administrator for Water that while Idaho would be publishing proposed standards for public review and

comment in the next several months.

... "Until we know what standard the public in Idaho prefers, we believe it is prudent to adopt the more protected standards of ten to the minus six."

EPA Region X is the permit issuing authority for the State and applies 10^{-6} for water quality based human health requirements. These permits have been certified by the State under section 401 as meeting water quality standards.

Kansas: Risk Level: 10^{-6}

The State completed a series of public hearings in August 1992 on proposed water quality standards revisions and is now processing public comments leading to the final, formal adoption hearing scheduled for January 1993. Formal adoption is scheduled for February 1993. The risk level in the current proposed standards is 10^{-6} . See proposed K.A.R. 28-16-286(c)(4)(B).

Michigan: Risk Level: 10^{-5}

For several years Michigan has been controlling toxics through application of the Guidelines for Rule 57. These guidelines are applied at a 10^{-5} risk level. See R 323, 1057(2)(d).

Nevada: Risk Level: 10^{-5}

On November 3, 1992, EPA received a letter from the Administrator of the Division of Environmental Protection, Department of Conservation and Natural Resources, "... that the public health risk level that DEP would prefer to see in federal regulations is 10^{-5} (one in one hundred thousand), unless a state can provide substantial support in the record that a risk level of 10^{-4} (one in ten thousand) is appropriate and protective. This gives states the flexibility to use a more conservative 10^{-6} risk level if they see fit, but without requiring it when it is not necessary."

New Jersey: Risk Level: 10^{-6} For Class A and B Carcinogens, 10^{-5} For Class C Carcinogens

New Jersey, on October 20, 1992, solicited public comment on proposed surface water quality standards. The comment period is to close on December 18, 1992. The proposed human health criteria for carcinogens are established on a two-tiered system for risk levels. See proposed N.J.A.C. 7:9B-1.5(a)4. The State previously had indicated their intention to do this in a letter to EPA on December 19, 1991.

Puerto Rico: Risk Level: 10^{-5}

In 1990, the State proposed and held public hearings on criteria for human health using a 10^{-5} risk level. Subsequently, the proposed standards were revised. Just recently the State

completed public hearings on the most recent revision to standards. The standards are under review by the Environmental Quality Board. The risk level remains at 10^{-5} .

Rhode Island: Risk Level: 10^{-5}

On November 2, 1992, the EPA Regional Administrator received a letter from the Director, Department of Environmental Management, that, along with the Department of Health, the State's "... policy choice on the promulgation of the human health criteria is for the adoption of a cancer risk level of 10^{-5} ." The Director also indicated that "... future modifications of this risk level, whether it be to 10^{-4} or 10^{-6} , could be considered on a pollutant and subpopulation basis to produce a site specific risk assessment and protection of human health."

Vermont: Risk Level: 10^{-6}

On May 27, 1991, State submitted to EPA final water quality standards which reference the EPA section 304(a) criteria to be applied at a 10^{-6} risk level. However, the effective date of these standards is not until January 1, 1995. This delayed effective date was the reason Region I advised the State that the State did not comply with section 303(c)(2)(B).

Washington: Risk Level: 10^{-6}

During the summer of 1992, the State formally proposed and held public hearings on revisions to its water quality standards. The standards, scheduled for adoption in late November 1992, include a risk level of 10^{-6} .

On December 18, 1991, in its official comments on the proposed rule, the Department of Ecology urged EPA to promulgate human health criteria at 10^{-6} . Specifically, "The State of Washington supports adoption of a risk level of one in one million for carcinogens. If EPA decides to promulgate a risk level below one in one million, the rule should specifically address the issue of multiple contaminants so as to better control overall site risks."

The final phrase in § 131.36(c)(2) relating to the applicability of the rule was amended by deleting the text beginning "but only * * *" EPA received numerous comments that the Federal criteria should be implemented consistently with current State practices. EPA amended the language because the Agency had not intended to be inconsistent with the provisions of the water quality standards regulation (40 CFR 131.21(c)), which provides that a State water quality standard remains

in effect even though disapproved by EPA, until the State revises it or EPA promulgates a rule that supersedes the State water quality standards.

Although not directly resulting in a change to the rule, this preamble clarifies, at the public's request, whether schedules of compliance were applicable to this rule. In Section E-3 EPA clarifies that schedules of compliance for these criteria are not provided for in these rules, but that such schedules of compliance are available in NPDES permits if authorized by State regulations. See *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, Before the Environmental Appeals Board, EPA, May 26, 1992.

Several deletions were made to the proposed human health criteria as a result of the Agency's review of data submitted in public comments and to reflect the pertinent impact of other relevant Agency actions. The revisions are as follows:

(1) Criteria for three pollutants included in the matrix of the proposed rule are not included in the final rule for (A) acenaphthylene, (B) benzo(ghi)perylene, and (C) phenanthrene. The criteria for these pollutants were removed because they are not recognized by the Agency as carcinogenic compounds nor do they have a reference dose that would allow the Agency to calculate a criterion level.

(2) Silver: The human health criteria for silver were deleted from this final rule because the criteria were developed based on a cosmetic effect impact and not a toxicity endpoint.

(3) Cadmium, Chromium, Selenium and Beryllium: As described below, the Agency has determined that the proposed criteria for these contaminants are no longer scientifically defensible and accordingly has withdrawn these criteria pending evaluation of relevant data regarding their toxicity. EPA notes that the criteria promulgated for aquatic life will provide adequate protection for human health in most instances.

(4) Methyl Chloride, Lead and 1,1,1, Trichloroethane: As described below, the Agency has determined that there is currently an insufficient basis for calculating human health criteria for these three contaminants. Accordingly, EPA has withdrawn the proposed criteria for these contaminants pending further analysis.

In addition to the above changes, the Agency is today withdrawing the human health criteria recommendations previously published in the 1980 Ambient Water Quality Criteria Documents for silver, cadmium, chromium, selenium, beryllium, lead,

methyl chloride, and 1,1,1, Trichloroethane. Summaries of the human health criteria were also published in Quality Criteria for Water, 1986. These summaries are also being officially withdrawn today.

EPA's final rule establishes a new § 131.36 in 40 CFR part 131 entitled, "Toxics Criteria for Those States Not Fully Complying with Clean Water Act, section 303(c)(2)(B)."

2. Scope

Subsection (a), entitled "Scope", clarifies that this Section is not a general promulgation of the section 304(a) criteria for priority toxic pollutants but is restricted to specific pollutants in specific States.

3. EPA Criteria for Priority Toxic Pollutants

As proposed, subsection (b) presents a matrix of the applicable EPA criteria for priority toxic pollutants. Section 303(c)(2)(B) of the Act addresses only pollutants listed as "toxic" pursuant to section 307(a) of the Act. As discussed earlier in this preamble, the section 307(a) list of toxics contains 65 compounds and families of compounds, which potentially include thousands of specific compounds. The Agency uses the list of 126 "priority toxic pollutants" for administrative purposes (see 40 CFR 131.36(b) herein). Reference in this rule to priority toxic pollutants, toxic pollutants, or toxics refers to the 126 priority toxic pollutants.

However, EPA has not developed both aquatic life and human health section 304(a) criteria for all of the 126 priority toxic pollutants. The matrix in paragraph (b) contains human health criteria in Column D for 91 priority toxic pollutants which are divided into criteria (Column 1) for water consumption (i.e., 2 liters per day) and aquatic life consumption (i.e., 6.5 grams per day of aquatic organisms), and Column 2 for aquatic life consumption only. The term aquatic life includes fish and shellfish such as shrimp, clams, oysters and mussels. The total number of priority toxic pollutants with criteria promulgated today differs from the total number of priority toxic pollutants with section 304(a) criteria because EPA has developed and is promulgating chromium criteria for two valence states with respect to aquatic life criteria. Thus, although chromium is a single priority toxic pollutant, there are two criteria for chromium for aquatic life. However, the human criterion is based on total chromium consistent with Agency policy. See pollutant 5 in § 131.36(b).

The matrix contains aquatic life criteria for 30 priority pollutants. These are divided into freshwater criteria (column B) and saltwater criteria (Column C). These columns are further divided into acute and chronic criteria. The aquatic life criteria are considered by EPA to be protective when applied under the conditions described in the section 304(a) criteria documents and in the "Technical Support Document for Water Quality-based Toxics Control." For example, waterbody uses should be protected if the criteria are not exceeded, on average, once every three year period. It should be noted that the criteria maximum concentrations (the acute criteria) are one-hour average concentrations and that the criteria continuous concentrations (the chronic criteria) are four-day averages. It should also be noted that for certain of the metals, the actual criteria are equations which are included as footnotes to the matrix. The toxicity of these metals are water hardness dependent and may be adjusted by determining appropriate water-effect ratios. The values shown in the table are based on a hardness expressed as calcium carbonate of 100 mg/l and a water-effect ratio of 1.0. Finally, the criterion for pentachlorophenol is pH dependent. The equation is the actual criterion and is included as a footnote. The value shown in the matrix is for a pH of 7.8 units.

Several of the freshwater aquatic life criteria are incorporated into the matrix in the format used in the 1980 criteria methodology which uses a final acute value instead of a continuous maximum concentration. This distinction is noted in footnote (g) to the table.

4. Applicability

Section 131.36(c) establishes the applicability of the criteria for each included State. It provides that the criteria promulgated for each State supersede and/or complement any State criteria for that toxic pollutant. EPA believes it has not superseded any State criteria for priority toxic pollutants unless the State-adopted criteria are disapproved or otherwise insufficient. The approach followed by the Agency in preparing § 131.36(d) is described in section E.2, and further rationale is provided in section E.3 of this preamble.

EPA's principal purpose today is to promulgate the toxics criteria necessary to comply with section 303(c)(2)(B). However, in order for such criteria to achieve their intended purpose the implementation scheme must be such that the final results protect the public health and welfare. In section F of this preamble a discussion focused on the

factors in EPA's assessment of criteria for carcinogens. For example, fish consumption rates, bioaccumulation factors, and cancer potency slopes were discussed. When any one of these factors is changed, the others must also be evaluated so that, on balance, resulting criteria are adequately protective.

Once an appropriate criterion is selected for either aquatic life or human health protection, then appropriate conditions for calculating water quality-based effluent limits for that chemical must be established in order to maintain the intended stringency and achieve the necessary toxics control. EPA has included in this rule appropriate implementation factors necessary to maintain the level of protection intended. These factors are included in subsection (c).

For example, in order to do steady state waste load allocation analyses, most States have low flow values for streams and rivers which establish flow rates below which numeric criteria may be exceeded. These low flow values became design flows for sizing treatment plants and developing water quality-based effluent limits. Historically, these so-called "design" flows were selected for the purposes of waste load allocation analyses which focused on instream dissolved oxygen concentrations and protection of aquatic life. With the publication of the 1985 Technical Support Document for Water Quality Based Toxics Control (TSD), EPA introduced hydrologically and biologically based analyses for the protection of aquatic life and human health.¹ EPA recommended either of two methods for calculating acceptable low flows, the traditional hydrologic method developed by the U.S. Geological Survey and a biological based method developed by EPA. The results of either of these two methods may be used.

Some States have adopted specific low flow requirements for streams and rivers to protect designated uses against the effects of toxics. Generally these have followed the guidance in the TSD. However, EPA believes it is essential to include design flows for steady state analyses in today's rule so that, where

¹ These concepts have been expanded subsequently in guidance entitled "Technical Guidance Manual for Performing Wasteload Allocations, Book 6, Design Conditions," USEPA, Office of Water Regulations and Standards, Washington, DC, (1988). These new developments are included in Appendix D of the revised TSD. The discussion here is greatly simplified and is provided to support EPA's decision to promulgate baseline application values for instream flows and thereby maintain the intended stringency of the criteria for priority toxic pollutants.

States have not yet adopted such design flows, the criteria promulgated today would be implemented appropriately. The TSD also recommends the use of three dynamic models to perform wasteload allocations. Dynamic wasteload models do not generally use specific steady state design flows but accomplish the same effect by factoring in the probability of occurrence of stream flows based on the historical flow record. For simplicity, only steady state conditions will be discussed here. Clearly, if the criteria were implemented using inadequate design flows, the resulting toxics controls would not be fully effective, because the resulting ambient concentrations would exceed EPA's criteria.

In the case of aquatic life, more frequent violations than the once in 3 years assumed exceedences would result in diminished vitality of stream ecosystems characteristics by the loss of desired species such as sport fish. Numeric water quality criteria should apply at all flows that are equal to or greater than flows specified below. The low flow values are:

Aquatic Life

- acute criteria (CMC) 1 Q 10 or 1 B
3
chronic criteria (CCC) 7 Q 10 or 4 B
3

Human Health

- non-carcinogens 30 Q 5
carcinogens harmonic mean flow

Where:

- 1 Q 10 is the lowest one day flow with an average recurrence frequency of once in 10 years determined hydrologically;
1 B 3 is biologically based and indicates an allowable exceedence of once every 3 years. It is determined by EPA's computerized method (DFLOW model);
7 Q 10 is the lowest average 7 consecutive day low flow with an average recurrence frequency of once in 10 years determined hydrologically;
4 B 3 is biologically based and indicates an allowable exceedence for 4 consecutive days once every 3 years. It is determined by EPA's computerized method (DFLOW model);
30 Q 5 is the lowest average 30 consecutive day low flow with an average recurrence frequency of once in 5 years determined hydrologically; and
the harmonic mean flow is a long term mean flow value calculated by dividing the number of daily flows analyzed by the sum of the reciprocals of those daily flows.

EPA is promulgating the harmonic mean flow to be applied with human health criteria for carcinogens. The concept of a harmonic mean is a standard statistical data analysis technique. EPA's model for human health effects assumes that such effects occur because of a long-term exposure to low concentration of a toxic pollutant. For example, two liters of water per day for seventy years. To estimate the concentrations of the toxic pollutant in those two liters per day by withdrawal from streams with a high daily variation in flow, EPA believes the harmonic mean flow is the correct statistic to use in computing such design flows rather than other averaging techniques.²

All waters, whether or not suitable for such hydrologic calculations but included in this rule (including lakes, estuaries, and marine waters), must attain the criteria promulgated today. Such attainment must occur at the end of the discharge pipe, unless the State has a mixing zone regulation. If the State has a mixing zone regulation, then the criteria would apply at the locations stated in that regulation. For example, the chronic criteria (CCC) must apply at the geographically defined boundary of the mixing zone. Discussion of and guidance on these factors are included in the revised TSD in chapter 4.

EPA is aware that the criteria promulgated today for some of the priority toxic pollutants are at concentrations less than EPA's current analytical detection limits. Analytical detection limits have never been an acceptable basis for setting standards since they are not related to actual environmental impacts. The environmental impact of a pollutant is based on a scientific determination, not a measuring technique which is subject to change. Setting the criteria at levels that reflect adequate protection tends to be a forcing mechanism to improve analytical detection methods. (See 1985 Guidelines, page 21.) As the methods improve, limits closer to the actual criteria necessary to protect aquatic life and human health became measurable. The Agency does not believe it is appropriate to promulgate criteria that are not sufficiently protective.

EPA does believe, however, that the use of analytical detection limits are appropriate for determining compliance with NPDES permit limits. This view of the role of detection limits was recently articulated in guidance for translating

dioxin criteria into NPDES permit limits which is the principal method used for water quality standards enforcement.³ This guidance presents a model for addressing toxic pollutants which have criteria recommendations less than current detection limits. This guidance is equally applicable to other priority toxic pollutants with criteria recommendations less than current detection limits. The guidance explains that standard analytical methods may be used for purposes of determining compliance with permit limits, but not for purposes of establishing water quality criteria or permit limits. Under the Clean Water Act analytical methods are appropriately used in connection with NPDES permit limit compliance determinations. Because of the function of water quality criteria, EPA has not considered the sensitivity of analytical methods in deriving the criteria promulgated today.

EPA has added provisions in paragraph (c)(3) to determine when fresh water or saltwater aquatic life criteria apply. In response to comments, this provision was expanded to incorporate a time parameter to better define the critical condition. The structure of the paragraph is to establish presumptively applicable rules and to allow for site-specific exceptions where the rules are not consistent with actual field conditions. Because a distinct separation generally does not exist between fresh water and marine water aquatic communities, EPA is establishing the following: (1) The fresh water criteria apply at salinities of 1 part per thousand and below at locations where this occurs 95% or more of the time; (2) marine water criteria apply at salinities of 10 parts per thousand and above at locations where this occurs 95% more of the time; and (3) at salinities between 1 and 10 parts per thousand the more stringent of the two apply unless EPA approves the application of the freshwater or saltwater criteria based on a biological assessment. The percentiles included here were selected to minimize the chance of overlap, that is, one site meeting both criteria. Determination of these percentiles can be done by any reasonable means such as interpolation between points with measured data or by the application of calibrated and verified mathematical models (or hydraulic models). It is not EPA's intent

² For a description of harmonic means see "Design Stream Flows Based on Harmonic Means," Lewis A. Rossman, J. of Hydraulics Engineering, Vol. 116, No. 7, July, 1990. This article is contained in the record for this proposal.

³ Strategy for the Regulation of Discharges of PHDDs and PHDFs from Pulp and Paper Mills to Waters of the United States, memorandum from the Assistant Administrator for Water to the Regional Water Management Division Directors and NPDES State Directors, May 21, 1990.

to require actual data collection at particular locations.

In the brackish water transition zones of estuaries with varying salinities, there generally will be a mix of freshwater and saltwater species. Generally, therefore, it is reasonable for the more stringent of the freshwater or saltwater criteria to apply. In evaluating appropriate data supporting the alternative set of criteria, EPA will focus on the species composition as its preferred method.

This assignment of criteria for fresh, brackish and marine waters was developed in consultation with EPA's research laboratories at Duluth, Minnesota and Narragansett, Rhode Island. The Agency believes such an approach is consistent with field experience.

In paragraph (c)(4)(i) EPA included a limitation on the amount of hardness that EPA can allow to antagonize the toxicity of certain metals (see footnote (e) in the criteria matrix in paragraph (b) of the rule). The data base used for the Section 304(a) criteria documents for metals do not include data supporting the extrapolation of the hardness effects on metal toxicity beyond a range of hardness of 25 mg/l to 400 mg/l (expressed as calcium carbonate). Thus, the aquatic life values for the CMC (acute) and CCC (chronic) criteria for these metals in waters with a hardness less than 25 mg/l, must nevertheless use 25 mg/l when calculating the criteria; and in waters with a hardness greater than 400 mg/l, must nevertheless use 400 mg/l when calculating the criteria.

In paragraph (c)(4), subparagraphs (i) and (ii) are the same as proposed. Subparagraph (iii) was added to incorporate the water-effect ratio guidance described in Section F-7 of this preamble.

Subsection (d) lists the States for which rules are being promulgated. For each identified State, the designated water uses impacted (and in some cases the specific waters covered) and the criteria are identified. In all cases, the criteria are applied to use designations adopted by the States; EPA has not promulgated any new use classifications in this rule although the Agency has the authority to do so.

H. (Reserved)

I. Response to Public Comments

The Response to Public Comment Section is organized into several subsections, as follows:

1. Legal Authority
2. Science
3. Economics
4. Implementation

5. Timing and Process
6. State Issues

I. Legal Authority

1. *Comment:* Several comments were received that in various ways suggested that EPA exceeded its authority in proposing to establish Federal water quality standards for States because it was alleged standards are to be developed by the States. These comments tended to emphasize the primary role attributed to States under the Clean Water Act in establishing standards with some going so far as to indicate that States should have full and unrestrained authority to act. In this mode, a comment was offered that all the Clean Water Act requires is a good faith effort on the part of a State to meet the statutory requirement. A related comment suggested that EPA can promulgate standards only after specifically disapproving a State's standard. There were opposing views offered suggesting that EPA not only has the authority to act, it is obliged to act.

Response: The Clean Water Act assigns States the primary role in establishing water quality standards and EPA has continually supported that role before Congress in reauthorization hearings on the Clean Water Act. The Act, however, also defines a role for EPA in terms of reviewing and either approving or disapproving State-adopted standards and of promulgating Federal standards. Sections 303(c) (3) and (4) of the Act clearly indicate that Congress did not intend States to have full and unrestrained authority to set standards. EPA's action in developing this rulemaking is not to be taken as a change in EPA policy in dealing with the States. Our policy continues to be that we prefer States to adopt their own standards but we will use our promulgation authority when warranted. EPA believes that the need to control the discharge of toxic pollutants to protect human health and the environment, the establishment of the statutory requirement for addressing toxic pollutants, and the responsibility for EPA review of State water quality standards for consistency with the Clean Water Act coupled with the inclusion of a process for Federal promulgation in the Act strongly supports EPA's promulgation authority. Moreover, this elaborate process also makes clear that Congress intended that States do more than just evidence a good faith effort.

As described in detail in section E of this Preamble, the Clean Water Act authorizes and establishes a timetable for Federal promulgation action. Under the Clean Water Act, States must adopt water quality standards to protect public

health and welfare and enhance the quality of water. Section 303(c)(4) of the Clean Water Act authorizes the Administrator of EPA to promulgate Federal standards applicable to a State when: (1) The State submits standards for EPA approval and EPA determines that the State standards fail to meet the requirements of the Act, or (2) in any case where the Administrator determines a new or revised standard is necessary to meet the requirements of the Act. EPA's implementing regulations also make clear that the Administrator may take action to promulgate either when a State fails to adopt changes specified in a disapproval or in any case where the Administrator determines a new or revised standard is necessary (40 CFR 131.22). Both these provisions are used to support this action. Although in fact EPA did notify the States in a Federal Register notice of April 19, 1990, and in a letter to the Administrator of the responsible State agency of each potentially affected State on April 9, 1990, the Administrator is not required in exercising the authority of section 303(c)(4) to specifically disapprove a State's standard when exercising the authority to promulgate Federal standards. Historically, in eight of the nine Federal promulgation actions completed, the Agency based its action on disapproval of State standards but in the ninth instance, a criterion for chloride in the Commonwealth of Kentucky, there was no disapproval involved (see 52 FR 9102, March 20, 1987).

2. *Comment:* Closely related to the above comments were others that asserted that EPA is empowered to promulgate Federal standards only on a State-by-State, waterbody-by-waterbody, pollutant-by-pollutant approach, and that Congress did not intend that national standards be developed. In the same vein, it was suggested that it would be easier for the public to respond if each State were proposed in a separate rule.

Response: Neither EPA nor the States are directed by either the statute or the implementing water quality standards regulation to establish standards in the manner suggested by the first comment. EPA's implementing regulation and policies certainly allow EPA to act in this way but it is not required to do so. Section 131.22(b) of the water quality standards regulation specifically indicates that the Administrator " * * * may propose and promulgate a regulation applicable to one or more states * * *."

We do not see this action as establishing national standards as it

expressly limits the application of the criteria in the final rule to the States named in the rule. (40 CFR 131.36(a))

As explained more fully in the preamble, water quality standards consist of designated beneficial uses of a State's waters and the criteria necessary to protect those uses. The comment urges a waterbody-by-waterbody approach. For purposes of this rulemaking, EPA is presuming that the States have adequately made such designated use determinations for its waters. EPA is merely adding criteria for priority toxic pollutants on a State-by-State basis sufficient to protect the State's designated uses. EPA believes its approach accomplishes the commenters' objectives but in a more comprehensive manner. Moreover, EPA doesn't believe this approach is more burdensome on dischargers in affected States. Because permit limits are incorporated into NPDES permits only for constituents having a reasonable potential to exceed State water quality standards, a discharger does not receive a limit in its permit unless its discharge contains the pollutant. Thus, comprehensive criteria coverage in water quality standards does not translate into unnecessary permit limits.

EPA is unpersuaded that somehow it would have been easier or more efficient for the public to comment on twenty-two separate rules covering the same issues than to deal with the issues in a single rulemaking. It would most likely result in EPA receiving the same type comments on each separate rule which would do nothing other than increase the administrative burden to EPA and further delay getting water quality standards in place.

3. *Comment:* A comment was made that several proposals for reauthorizing the Clean Water Act considered by Congress in 1991 contemplated giving EPA authority to promulgate Federal standards thus indicating that EPA does not have such authority now.

Response: A response to a comment above describes EPA's current authority to act under terms of the Clean Water Act. The principal CWA reauthorization bills considered by Congress in 1991 would neither question nor limit this existing authority. Rather they would alter the water quality standards program as it now exists by providing specific deadlines for States to act in adopting standards based on recommendations published by EPA and then mandating Federal promulgation by a date certain. Rather than suggesting that EPA does not now have such authority, these proposals support EPA's view that Congress is becoming increasingly impatient with

the slow pace at which States adopt new criteria recommendations issued by EPA under section 304(a) and is willing to consider supplementing EPA's current discretionary promulgation authority.

4. *Comment:* Several comments suggested that EPA's promulgation action should be limited to the waterbodies and pollutants reported on the section 304(l) lists or information contained in section 305(b) Water Quality Inventory Reports. The basic thrust of these comments were that such lists, prepared by the States, contain sufficient information necessary to identify all potential toxic problem areas within the State. Some of these commenters also suggested these limited sources were more accurate than the broader approach relied on in EPA's proposal.

Response: A detailed description of the approach the Agency followed in developing this final rule is included in section E-2 of this preamble. As indicated in that section, EPA used information from a variety of sources in determining which criteria to include in the rule for each State. The Agency did not rely on a single source, such as 304(l), 305(b), or any other set of information.

Each of the data sources suggested by the commenters are valuable tools which serve specific purposes under the Clean Water Act. However, as described in section E-2, each source has limitations either as to coverage of waterbodies or sources of pollution, extent of information included, or a narrow focus because of their particular purpose. Even when information from a variety of sources is used as described as the Agency's "strawman", there remain inherent weaknesses in the underlying data.

EPA believes there is a greater possibility of achieving the statutory purpose of protecting water uses by relying on a range of available data sources rather than selecting one or two narrow databases. EPA believes that by not directing the Agency to use the results of the other statutory sections the commenters identified, and by use of the "could reasonably be expected to interfere" language, Congress directed the Agency to be more inclusive rather than less inclusive in the applicable criteria coverage. Thus, EPA urged a low threshold for inclusion of priority toxic pollutants in the guidance transmitted to the States.

5. *Comment:* One commenter argued that EPA's strawman systematically overestimates the presence of priority toxic pollutants because of its use of industry wide default assumptions for particular SIC codes. The commenter

further argues that comparisons between the number of toxics adopted in States who evaluated available data for toxics and established criteria based on that data to the results of the strawman predictions show that a substantially smaller number of pollutants resulted. The commenter urged that only section 304(l) short list pollutants should be used for this rule.

Response: EPA's strawman analysis was designed to use all of the Agency's data bases to develop candidate lists of toxics on a State specific basis. States were urged to use this information as a starting point in evaluating the need for particular priority toxic pollutants.

EPA intentionally designed the analysis to yield a list of suspected priority toxic pollutants that would not understate the potential presence of such pollutants. As noted in the preamble, State monitoring information, for example, as used in the section 305(b) water quality reports, is not comprehensive in either geographic or parametric coverage. That is the reason EPA used the industry profile data—to maximize the data base.

Thus, EPA was providing the States with a listing that identified potential toxics and where those were potentially located. The State was encouraged to verify the lists. EPA has not used the list to identify pollutants for States included in this rulemaking. Rather EPA has viewed the analysis as supporting its contention that priority toxics exist in State waters and therefore, a broad promulgation for priority toxic pollutants is justified.

In arguing for limiting the promulgation to the section 304(l) short list pollutants, the commenter failed to compare the criteria the example State adopted in its water quality standards versus the pollutants identified in its section 304(l) short list. The State used as an example placed substantially more criteria in their standards than in their section 304(l) short list. The reason for this disparity is because the threshold for inclusion in water quality standards is much lower than for inclusion in the section 304(l) short list.

6. *Comment:* EPA solicited comment concerning the acceptability of the review process used by EPA to determine compliance with the Act—this process is described in section D of this preamble. EPA received few public comments in response to this request, beyond the general comment that EPA exceeded its authority to promulgate Federal standards, an issue addressed earlier in this section. One view offered was that the review process used by the Agency makes it difficult to evaluate whether adequate consistency was

applied by the Regions in evaluating acceptability of State standards.

Response: Each State's water quality standards submission is different. They require case specific review for adequacy and consistency with environmental and human health requirements and statutory and regulatory provisions. The statute allows for State flexibility. Given these factors, EPA established broad guidance parameters and Regional Offices reviewed each submission for consistency. EPA Headquarters staff exercised oversight on this process to assure appropriate inter-Regional consistency. This process did not produce identical standards in each State but that is not required. All State standards that were approved were judged by EPA to meet the twin tests of protection of water body uses and scientific defensibility.

Both the criteria development and the standards programs are iterative programs and EPA expects to request States to continue to focus on adopting criteria for additional toxic pollutants and revising existing criteria in future triennial reviews which new information indicates is appropriate. In no sense should States or the regulated community assume that the task of addressing pollution from toxics is completed by what the States have adopted or EPA is promulgating in the way of criteria for toxic pollutants.

7. Comment: EPA did not propose criteria for inclusion in State standards when the criteria were based on organoleptic effects. The Agency specifically solicited comment on this issue. Most of the comments received indicated that EPA was correct in not including such criteria in the rule. There were several comments to the contrary indicating that such criteria should be included because the pollutants are on the section 307(a) list and EPA did issue a criteria recommendation for the pollutant under section 304(a). Therefore, they argue that the requirements of section 303(c)(2)(B) apply.

Response: In the final rule, EPA has not included criteria for pollutants where the section 304(a) criteria recommendation was based on organoleptic effects. Such effects cause taste and odor problems which may increase treatment costs in drinking water or the selection by the public of alternative but less protective sources of drinking water and may cause tainting of or off flavors in fish flesh and other edible aquatic life reducing their marketability and resource value. EPA is also aware that some States have adopted such criteria in their standards.

Nonetheless, because section 303(c)(2)(B) focuses on toxicity of the priority toxic pollutants, EPA believes its rule should likewise focus on toxicity. The 304(a) criteria documents for these pollutants do not recommend a criteria based on toxicity and therefore such criteria are outside the intent of a rulemaking for section 303(c)(2)(B).

This decision notwithstanding, it should be noted that the criteria based on organoleptic effects still represent the Agency's best scientific recommendations at this time and are within the range of scientific acceptability for a State's use.

8. Comment: One commenter asserted that EPA's Option 3 (i.e. adoption of a narrative standard coupled with a translator mechanism to compute a derived numeric limit) of its December 1988 guidance on complying with the Act does not meet the legal requirements of section 303(c)(2)(B). It is argued that EPA should therefore disapprove all State water quality standards which rely solely on a narrative "free from" toxics water quality standard and a translator mechanism. A related comment is that this translator procedure may be appropriate as a supplement to adopting specific numeric criteria.

Response: The legality of Option 3 is not an issue in this rulemaking. We are not promulgating any water quality standards based on Option 3. Option 3 is only a potential issue in the subsequent approval of standards for those States which are not included in this rule.

Nevertheless, as noted in the December 1988 guidance, EPA believes the combination of a narrative standard along with a translator mechanism as a part of a State's water quality standards can satisfy the substantive requirements of the Clean Water Act. Such translators would need to be subject to all the State's legal and administrative requirements for adoption of standards plus review and either approval or disapproval by EPA, and result in the development of derived numeric criteria for specific section 307(a) toxic pollutants.

EPA's guidance presented several factors that EPA expected to be incorporated into a translator process in order to comply with the Act. In essence, EPA expected that the technical mechanism used would need to be equivalent to a criteria development protocol. That is, it would need to include an appropriate number of sensitive species using suitable testing and analytical methodologies. If established and applied correctly, EPA has indicated that it could meet the

legal requirements of section 303(c)(2)(B). The central objective of section 303(c)(2)(B)—establishing chemical specific numeric limits—is achieved by this approach. There is no statutory bar to it and the Agency sees no reason not to continue to support this approach by States.

Ultimately, EPA believes all State toxic control programs will be strengthened by adoption of both chemical specific standards and a translator mechanism for those pollutants where water quality criteria have yet to be developed.

9. Comment: EPA invited comment on whether to promulgate a translator mechanism for the States in this final rule. A translator mechanism would enable the States to derive numeric limits for pollutants beyond those in this promulgation based on a State's general narrative criterion. The Agency received comments both supporting and opposing this approach.

Response: While a translator mechanism could be a valuable supplement to State standards to deal with toxics for which no section 304(a) criteria recommendation is available, it is not necessary for EPA to promulgate a translator at this time to meet the objectives of section 303(c)(2)(B). Today's promulgation of chemical specific criteria fulfills that obligation. For that reason a translator mechanism is not included in today's final action. However, EPA believes that such a mechanism should be available in all States. Therefore, in revisions to the basic water quality standards regulation, EPA may propose a requirement for a translator mechanism which would be applicable to all jurisdictions included in the standards program.

10. Comment: Comments were received that EPA is attempting to establish use classifications in this rule and that such action is a right belonging to a State.

Response: The use classifications to which Federal criteria are applied in this rule are the classifications established and defined by each State affected by the rule. EPA is not creating State use classifications nor assigning use classifications to any water bodies in this rule. In the few instances described in Section G of this preamble, appropriate adjustments to uses and criteria were made as necessary to accurately reflect State use classifications. Further, EPA believes the regulated community is fully aware of the uses adopted by a State and to which water bodies the uses apply. Specific revisions in the rule pertaining to State use classifications are discussed

in subsection 6 of the Response to Public Comments Section.

11. *Comment:* During the pendency of this rulemaking, several States asked if adopting an emergency rule would be sufficient to allow removal of the State from the final promulgation. Several States also indicated they should be removed from the rule because they had plans to adopt standards.

Response: Emergency rulemaking actions by States are not judged by EPA as sufficient basis for removal from this rulemaking. In most cases, State emergency rules have a limited duration and expire at a date certain. There is no assurance that enforceable permanent water quality standards would be in-place at that time. If EPA were to allow emergency rulemakings to be the basis for removal from this package, given the long delays to date by these States, there is the strong possibility promulgation action would have to be commenced again by EPA in the near future. The delays and related program disruptions experienced by EPA have already been too great. There has to be closure on the standards adoption portion of our toxic control efforts. Reliance on temporary emergency State actions would not produce that closure.

There is also the question of legal vulnerability to the adoption of emergency rules and whether the State emergency rule procedures allow for sufficient public review. Moreover, the emergency rules adopted would have to fully comply with the Act. States which contend they should be dropped from this rule because they now plan to adopt standards remain in this rule because EPA has no reasonable means of being assured standards will be adopted as planned. Since passage of the amendments in 1987, many State plans for standards adoption have not been completed as anticipated. When States complete approvable adoptions, EPA will take timely action to remove the promulgation as applicable to that State.

12. *Comment:* One commenter asserted that States do not have the necessary legal authority under State law to use national water quality standards in State permits.

Response: Without more information, we cannot determine the precise concerns of this commenter. However, section 402(b) of the Clean Water Act requires that States approved to administer the National Pollutant Discharge Elimination System (NPDES) program must have adequate authority to issue permits which comply with any applicable requirements of section 301 of the Act. Among those requirements are limitations to meet water quality standards, and the criteria promulgated

today are " * * * applicable water quality standard(s) established pursuant to this Act." Section 301(b)(1)(C).

Once promulgated, Federal standards will be the basis of all environmental control programs designed to meet water quality standards. States which had inadequate criteria for toxics will have a much more complete basis for determining if there are toxic contamination problems in their waters. If problems are identified, the State and EPA will need to work together to see if the sources of these problems can be identified and controlled. The most direct impact will be on NPDES permits for individual point source discharges. The permitting agency, whether it be the State or EPA will have to determine on a case-by-case basis whether to re-open an individual permit or wait until a permit expires before introducing new limits.

13. *Comment:* One commenter described ongoing judicial and administrative proceedings to establish the authority of the state to set permit limits for dioxin by interpreting the state's narrative criterion using EPA's section 304(a) dioxin guidance. The commenter indicated that the state has consistently implemented its narrative water quality criterion to control dioxin discharges by interpreting that criterion using EPA's guidance. It is the commenter's view that if the state prevails in the ongoing litigation, it will effectively have a numeric criterion for dioxin.

Response: The critical flaw in the commenter's argument is that the State does not have in-place an EPA-approved numeric criterion for dioxin, or an approved translator to generate a numeric criteria for dioxin. Moreover, conclusion of the litigation would not establish an approved numeric criterion, even if the State were to prevail. EPA understands that States often implement their narrative criteria by interpreting those criteria using EPA guidance. EPA supports this process by the States. However, section 303(c)(2)(B) is clear that States are to adopt numeric water quality criteria for toxic pollutants. The purpose of this rulemaking is to finally establish the necessary numeric toxic criteria in all States, and only those states with the necessary approved numeric criteria are excluded from the rule.

2. Science

The response to comments in this subsection are included under the following headings: (A) General Comment, (B) Aquatic Life Criteria, and (C) Human Health Criteria.

A. General Comments

14. *Comment:* Numerous comments were received that EPA's water quality criteria were published as scientific guidance and were never intended to be used as regulatory provisions without modification to reflect local environmental conditions. Related comments indicated that because the criteria were published as guidance, the public comment received on the draft water quality criteria documents were restricted since reviewers did not anticipate their use as enforceable limits.

Response: Water quality criteria are published as scientific information or guidance under section 304(a) of the Act because that is what the Clean Water Act specifies. EPA's implementing water quality standards regulation recognizes that the section 304(a) criteria may be used as a basis for States to establish enforceable standards. See 40 CFR 131.11(b). To imply that the section 304(a) criteria are merely informational and not directly related to establishing water quality standards under section 303(c) is not only reading the Act in an crabbed manner, it also ignores 26 years of program history which demonstrates that States generally rely on the criteria recommended by EPA in establishing standards. Moreover, this rulemaking is the process which transforms these recommendations into enforceable regulatory requirements for specific States. Any specific issues related to establishing these criteria as applicable to State standards could have been raised during this rulemaking even if the issues were raised or considered in the earlier publication of criteria documents.

Furthermore, although the EPA water quality standards regulation allows State modification of water quality criteria to reflect local, site-specific conditions, it is not a requirement to do so. EPA is also not obligated to modify criteria to reflect local environmental conditions although ideally EPA would consider any data submitted in support of establishing a site-specific criterion in determining whether site-specific criteria would be appropriate. In addition, EPA believes the methodology and the extensive data base used by the Agency results in deriving national criteria that will be protective for most species in virtually all waterbodies throughout the country. (See 1985 Guidelines, page 4.)

Congress has given substantial credibility to the section 304(a) criteria as well. For example, in section 301(h)(9) applicants must meet the

section 304(a) criteria as if they were regulatory.

Finally, it should be noted that when announcing the availability of draft and final criteria documents, it is stated in the EPA announcement that such criteria may form the basis for enforceable standards. EPA believes that adequate notice of the uses of the section 304(a) criteria has been provided to the public.

15. *Comment:* Commenters suggested in general that the EPA criteria are outdated and need to be revised extensively to reflect the latest scientific information available before they can be appropriately used in rulemaking. For a few pollutants data were submitted to substantiate this claim. (See response to comments on specific pollutants below.)

Response: EPA does not agree with these comments for several scientific, programmatic, and statutory reasons. Scientific information is constantly evolving. Additional research is always being done, test methods and theories improve, and more precise analytical methods become available. There can be a long lag time between conducting the research, analyzing the data, issuing the criteria documents for review, revising the documents, and working through the State or Federal administrative processes to adopt standards. There comes a point in this process, where the administering agencies, both EPA and the States, have to act using the existing criteria recommendations based on the methodology by which they are derived, and put standards into place so that control programs can be implemented to protect the health of the public and the environment. One basic reason why criteria and standards is an iterative process is to continuously evaluate and incorporate new information. Through this process, many of EPA's criteria have been updated since issuance of the formal criteria documents.

Moreover, once standards are in place, applications can be made through the mathematical models used to derive total maximum daily loads and wasteload allocations. These determinations are associated with the NPDES permits process and result in permit limits being established that have sufficient latitude to adequately account for other than major adjustments to individual criteria recommendations.

Finally, it must be recognized that Federal promulgation is the end of the process to establish water quality standards, not the beginning. In this case, the beginning was in 1980 when most of the criteria and the first generation criteria development methodologies were issued. By 1983,

due to lack of response by the States, EPA revised its basic water quality standards regulation to put primary emphasis on the adoption of water quality criteria and control of toxic pollutants. This too failed to engender adequate State response which in turn led to the directive from Congress contained in section 303(c)(2)(B). Now, five years later, and two years after the States should have taken action, this final rule completes the process of establishing the first set of comprehensive standards for toxic pollutants. This final Federal promulgation ends this current effort but the revision of criteria based on new research, the revision of applicable standards, alterations in analytical methods, and the evolution of control technologies will continue.

EPA asserts, as we have elsewhere in this preamble, that the promulgation process established under the Clean Water Act is a process designed to bring to closure the act of putting enforceable standards into place as basis for environmental control programs designed to protect public health and the environment. The promulgation process is not designed or intended to be the vehicle for a reevaluation of the scientific underpinnings of water quality criteria. It is also not the process for protracting the debates about the scientific merits of various pollutants. That debate is essential, necessary, and is constantly ongoing but as a separate activity. The promulgation process envisioned must go forward and the Agency must make decisions based on the available data. It is clearly a means to end such debates and to get environmental controls started based on available information.

EPA believes the criteria promulgated today are scientifically sound as they are based upon a technically and scientifically acceptable methodology. Detailed descriptions of the formulation of aquatic life criteria and human health criteria are included in section F (1, 2, and 3). As discussed below, we have made some revisions to the criteria based on public comments. Our criteria for both human health and aquatic life provide a reasonable amount of protection with only a small possibility of substantial overprotection or underprotection.

To completely review all the criteria as some suggested would take a minimum of several years during which time the human health and environmental problems associated with the continued discharge of toxic pollutants would worsen. There is no predetermined result from an extended review—some criteria might become

more stringent, some less, some might remain the same. In the meantime, the States that failed to comply with the Act are rewarded for their failure. These States have delayed while 43 of the jurisdictions included in the program have adopted water quality standards for the most part relying on EPA's section 304(a) criteria guidance.

As indicated in this preamble, we are currently re-examining our basic criteria development methodology, which is a normal course of action for the Agency. We anticipate some changes will be made and we assume some changes in the criteria will be made over the years. This, however, is no reason to suspend action now.

16. *Comment:* The use of information contained in the Agency's Integrated Risk Information System (IRIS) to update human health criteria was questioned by several commenters. The central concerns were that the information contained in the system was not subject to external peer and public review, the background information contained in IRIS is not readily available for review, and the public had little chance to review the results of the recalculations.

Response. A detailed discussion of the IRIS may be found in Section F-3 of this preamble. To summarize the salient points: (1) Reference doses and cancer classifications are validated by two Agency work groups composed of senior Agency scientists from all other program offices (i.e., internal peer review), (2) the consensus opinion for reference doses and slope factors are then used throughout EPA for consistent regulation and guidance development, (3) the data are available through the TOXNET System maintained by NIH and through diskettes available from the National Technical Information Service (NTIS), (4) the information used to recalculate the section 304(a) criteria in today's rule was included in the record of this rulemaking, and (5) through the proposal of this rule, the public had an opportunity to review and comment on the revised criteria. In addition, some of the RfD values and the cancer potency slope factors undergo public review during rulemaking for other Agency programs such as drinking water, pesticides, and Superfund. Thus, EPA believes that adequate notice about IRIS and its use in Agency programs has been provided to the public, at least as it concerns its use in this rulemaking.

17. *Comment:* Several commenters indicated that the criteria should be subjected to a peer and public review process similar to that followed by the Agency in issuing proposed criteria

under section 405 of the Act concerning the disposal of wastewater solids.

Response: The proposed regulations for the disposal of wastewater solids represented the first time EPA proposed such standards, and was the first time a methodology and specific criteria were proposed by EPA for wastewater solids. Therefore, the extensive review for that proposed regulation was appropriate. The situation is not the same for the criteria promulgated in today's rule. EPA and the States have been regulating the discharge of pollutants into surface waters for many years. The methodologies for deriving criteria for the protection of both human health and aquatic life were peer and publicly reviewed in 1980. The aquatic life guidelines were revised with peer and public review in 1985. Both methodologies are currently being reviewed for possible revisions. As discussed elsewhere in this section, this rulemaking makes use of the existing criteria and therefore is not the most effective vehicle for revising either the methodologies or the actual criteria.

18. *Comment:* Several commenters objected that applying criteria as standards when the criteria are below analytical detection limits is unreasonable because this may force the imposition of unreasonable permit limits and "false positive" indications of non-compliance. Others suggested that it was not clear how detection limits affect permit limits and compliance. There were also comments supporting EPA's position as described in the proposal.

Response: In consideration of statutory requirements that water quality standards are to be protective of designated stream uses, EPA has determined that consideration of analytical detectability would not be an appropriate factor to consider when calculating the water quality criteria component of water quality standards. This has been the Agency's position since the inception of the water quality standards program in 1965.

Although the sensitivity of analytical methods are not appropriate for setting water quality criteria, they may be appropriate in determining compliance with permit limits based water quality standards. It should also be noted that by the time standards are converted into permit limitations after calculating total maximum daily load and wasteload allocations, the actual permit limit may be in the range of standard analytical methods cited by EPA in 40 CFR part 136.

EPA's criteria development methods for aquatic life are generally based on laboratory bioassays with sensitive

aquatic life. The results from these tests are analyzed by mathematical procedures outlined in EPA's criteria methodology guidelines. EPA human health criteria are developed from protocols generally using toxicity studies on laboratory animals such as mice and rats. Thus, EPA's criteria are effect-based without regard to chemical analytical methods or techniques.

Because water quality standards developed pursuant to section 303(c) of the Clean Water Act are not self-enforcing, the measurement of these chemicals in a regulatory sense is generally in the context of an NPDES permit limitation. The permit issuing authority, either a State or EPA, in conjunction with the permittee establishes the analytical methodology to be used in determining compliance with the permit limit.

As noted in footnote 3 of this preamble, EPA has issued guidance on how constituents with water quality criteria specified at less than the sensitivity of official analytical methods (i.e., those listed in 40 CFR part 136) are established in permits.

EPA's water quality standards regulation at 40 CFR 131.11 requires that criteria be adopted by States at concentrations necessary to protect designated uses. The criteria promulgated today meet that requirement while EPA's policy with respect to regulatory compliance takes analytical sensitivity and precision into consideration.

B. Aquatic Life

19. *Comment:* A few comments questioned the role of biological criteria in the standards program with one commenter suggesting that establishing numeric limits is contrary to achieving the biological goals of the Clean Water Act.

Response: Together, chemical and physical characteristics and biological integrity define the overall ecological integrity of an aquatic ecosystem. State regulatory agencies should strive to fully integrate all three approaches since each has its respective capabilities and limitations. EPA's position is that each approach as represented by whole effluent toxicity testing, chemical specific criteria, and bioassessment approaches is independently applicable (see Policy on Use of Biological Assessments and Criteria in the Water Quality Program, U.S. EPA, May 1991). A description of the integration of these approaches along with a detailed analysis of the capabilities and limitations of each approach may be found in the Technical Support Document for Water Quality-based

Toxics Control, March 1991. See TSD Section 1.5 beginning on page 20, and references cited therein.

20. *Comment:* A commenter argued that EPA's proposed national aquatic life criteria will be overprotective for many surface waters because they do not account for site-specific conditions. At a minimum, any federal water quality criteria must take into account broad aquatic life categories.

Response: The development of EPA's criteria is based on a broad aquatic life data set. The 1985 guidelines recommend that eight species from eight separate families be used in the development of the freshwater and saltwater criteria. While it is always beneficial to have more data, EPA's peer reviewed guidelines establish that criteria developed from this minimum data set adequately protect aquatic communities (1985 Guidelines, see section III, p. 22). The apparent level of protection is different for each kind of effect (acute or chronic toxicity to animals, toxicity to plants, etc.) because of the quality and quantity of information. An attempt was made to take into account such things as the importance of the effect, the quality of the available data, and the probable ecological relevance of the test methods. The present approach to aquatic toxicity allows conclusions to be made about the ability of a substance to adversely affect aquatic organisms and their uses whenever the minimum data set are satisfied. See also the discussion on metals speciation in Section F-7 and the response to comment below.

21. *Comment:* One commenter asserted that EPA has incorrectly concluded that the Section 304(a) criteria are appropriate for most waters because there have been few occasions where site-specific water quality criteria have been applied.

Response: EPA's determination that Section 304(a) criteria are generally applicable is not based on a lack of site-specific criteria modification studies as asserted by the commenter. EPA has conducted a series of field applicability studies to determine the correlation between chemical specific criteria and receiving water impacts. (Technical Support Document for Water Quality-based Toxics Control, March, 1991 at p. 2). These test results indicate a good correlation between the laboratory concentrations and expected field results. The water quality criteria are not threshold values. One should not expect that once these values are exceeded, the result is a measurable impact on aquatic life. The aquatic life criteria embody conservative assumptions so that small excursions

above the criteria will not result in adverse impacts. The data indicate that if ambient water quality criteria are met, organisms in the receiving water are protected from adverse impacts.

22. *Comment:* Comment was received that EPA should clarify that the aquatic life water quality criteria for arsenic are based on the trivalent form of arsenic.

Response: The arsenic criteria promulgated today are applied on total recoverable inorganic arsenic. The 1985 arsenic criteria document is derived from data on Arsenic (III). However, because there is no readily available or practical analytical method to quantify the various forms of arsenic in monitoring applications for aquatic life, EPA has concluded that it is reasonable to quantify environmental arsenic concentrations as total recoverable inorganic arsenic. (EPA Methods 206.2, 206.3, 206.4, 206.5.)

In addition, EPA reevaluated the acute and chronic toxicity data on the two most prevalent forms of arsenic in aquatic systems (trivalent and pentavalent arsenic) in the Arsenic criteria document. These data show that arsenic (III) and arsenic (V) toxicity is similar for both sensitive freshwater and saltwater species. For five of the six freshwater species and all of the saltwater species used in the arsenic calculation where there was comparable information on acute and chronic toxicity, values were within a factor of two or three. Certain plants, for example *Selenastrum capricornutum* (alga), are 45 times more sensitive to arsenic (V) than to arsenic (III). Therefore, it is reasonable to combine forms of arsenic to specify the criteria. The measurement of total recoverable arsenic has both toxicological and practical advantages and appropriately represents the aquatic life toxicities of arsenic compounds.

23. *Comment:* Several commenters asserted that criteria based on laboratory tests are overprotective when applied in the field. Another commenter quoted laboratory study reports stating that the results are applicable only to the particular water tested.

Response: EPA agrees that waters used for laboratory toxicity testing are generally cleaner than many natural systems. In cases where ambient waters contain constituents which alter the toxicity of chemicals, an increase in accuracy may be provided by rerunning the toxicity tests in site water. (For example, the water-effect ratio approach for metals promulgated today.) In most instances, this correction will be small. (TSD, March 1991, p.2). Therefore, applying the criteria values developed from laboratory testing provides an acceptable level of accuracy, and this

approach is used by most States. In the context of this rule it represents a technically acceptable approach to cover a variety of waters, and the only feasible one. (See also the response to comments for the 1980 Guidelines, Nos. 17 and 19, 45 FR 79359, November 28, 1980.)

In response to the second comment, the scientist running the specific toxicity test referenced by the comment noted that its accuracy is only guaranteed for the specific water tested. However, applying these tests to other waters is an acceptable approximation. (See response to public comments for the 1980 Guidelines, 45 FR 79359-79360, comment #20 and #21.) Additionally, laboratory toxicity testing is the most reasonable and practical way to develop a database which is large enough to develop criteria, and diverse enough in species, which generally represent a larger source of variability.

While most States have not chosen to perform site-specific toxicity tests, any State may develop site specific-criteria. These criteria will be more appropriate and tailored to the site for setting NPDES permit limits than EPA's national criteria. Because they are amended water quality standards, site specific criteria are subject to EPA review. Other than the water-effect ratio for metals which is promulgated today, State developed site specific-criteria do not replace the criteria promulgated in today's rule unless the site specific-criteria are approved by EPA as meeting the requirements of the Act and EPA amends the rule adopted today.

24. *Comment:* Comment was received that the proposed rule includes some aquatic life criteria computed using the 1980 guidelines methodology and others were computed using the 1985 guidelines methodology. It was asserted that the simplistic approach of the 1980 methodology ignores the scientific improvements of the 1985 guidelines. The commenter urged that these criteria should be updated to provide consistent methodology and adherence to the statutory requirement of section 304(a).

Response: As the commenter noted, some of the aquatic life criteria in this rule are based on 1980 guidelines. EPA reviewed the data base for these criteria and determined that in general they could not be recalculated by the 1985 guidelines because of differences in data base requirements between the two guidelines used species specific requirements whereas the 1985 guidelines expanded this to broader taxonomic categories.) EPA believes that the data used in the 1980 criteria document are sound. As a practical matter, a reasonable approximation to a

criteria maximum concentration can be obtained by simply dividing the final acute values in the matrix by 2. The criteria in the matrix in today's rule were not changed from the results of the respective 1980 and 1985 methodologies. Therefore, EPA has reconsidered these aquatic life criteria at the commenter's request and considers them to be within the acceptable range based on uncertainties associated with computing water quality criteria. These criteria are protective of aquatic life and are scientifically sound.

The development of aquatic life criteria is a dynamic process which responds to the influence of improved science. It is expected that this science will be constantly evolving as new analytical techniques become available and new studies are evaluated. To this end, EPA is also reviewing the current methodology for developing aquatic life criteria. The current methodology will be reviewed, and if needed, revised to incorporate the latest concepts of aquatic toxicology.

25. *Comment:* A commenter asserted that the proposed aquatic life criteria may be underprotective since they fail to account for synergism and additivity and fail to consider wildlife impacts.

Response: EPA agrees that the aquatic life criteria do not deal with simultaneous exposure to more than one pollutant. This is largely because few data are available, the data which are available do not allow for development of useful principles and there are so many possible combinations of pollutants present to prevent development of appropriate guidance. EPA has considered the effects of multiple toxics discharged into receiving waters. (Technical Support Document for Water Quality-based Toxics Control; March 1991.) The studies cited in the TSD indicate that the median combined effect of a mixture of acutely toxic pollutants in receiving water is additive. EPA recommends, that in the absence of site-specific data, regulatory authorities consider combined acute toxicity to be additive. Thus, the combined acutely lethal toxicity to fish and other aquatic organisms is approximately the simple addition of the proportional contribution from each toxicant.

However, available data do not indicate additivity for chronic toxicity. EPA further recommends that chronic toxicity not be considered additive, and that each toxic be considered individually.

Synergism has not been demonstrated to be an important factor in the toxicity of effluents. Field studies or effluent toxicity and laboratory tests with

specific chemicals support an inference that synergism is a rare phenomenon. (See TSD, page 24.) (See also response to comments in the 1980 Guidelines, Comment #9, 45 FR 79358, November 28, 1980.) Theoretically, antagonism is just as likely to occur, which might suggest that the criteria are overly protective in an environment exposed to contaminant mixtures.

EPA considers the criteria, when applied with the appropriate frequency and duration of exposure, to adequately protect wildlife. Three of the aquatic life criteria in this rulemaking are based on wildlife toxicity and exposure, (Selenium, DDT and Polychlorinated Biphenyls). EPA is in the process of developing a wildlife criteria development methodology to provide further guidance for wildlife concerns. Once this tool is developed, EPA will have a method of focusing criteria on wildlife issues.

26. *Comment:* Several commenters argue that the criteria do not apply to semi-arid ecosystems. None of the guidance issued to date expressly address the means to apply those criteria to semi-arid ecosystems found in Arizona. Ephemeral streams and effluent dominated waters are distinct classes of waters that should be regulated to protect the aquatic species that typically inhabit them.

Response: Water quality criteria are toxicity based values, usually chemical specific. The criteria are based on toxic effects to a broad taxonomic group and do not consider the types of water bodies, such as semi-arid ecosystems, they may be applied to. Aquatic life criteria, when implemented as part of water quality standards, are meant to be protective of aquatic life. These standards are applied to specific waterbodies through designated uses. For this rulemaking, EPA assumes that States correctly define designated uses and the specific waterbodies to which those uses apply. EPA agrees that ephemeral streams and effluent dominated waters are distinct classes of waters. If a State feels an aquatic life use designation is appropriate for these waterbodies, then the aquatic life criteria will apply to protect that use. If not, then they will not apply. EPA is not promulgating designated uses for State waters. EPA is only applying appropriate aquatic life criteria to waters that States designated for aquatic life protection.

27. *Comment:* Comment was made that EPA should allow an alternate methodology for calculating the Final Acute Value when dealing with small data sets.

Response: EPA has considered alternate methods for calculating the Final Acute Value (FAV). The present methodology was developed by the Agency's guidelines committee, subjected to outside peer and public review, and is a reasonable technique. EPA develops a Final Acute Value on as large a data set as available. The guidelines generally require eight separate families for derivation of acute values (1985 Guidelines, p. 23). EPA considers this to be an adequate data set for calculation of the FAV. As the data set grows it only provides additional confidence of the scientific basis for calculating the Final Acute Value. The present methodology has been reviewed both within and outside the EPA for scientific merit. EPA considers the present methodology to be sound. The guidelines are presently under review. The method suggested by the commenter is relatively new, and it and other statistical bases for criteria development are being reviewed in the Agency's current effort in reviewing the criteria development guidelines. It is intended that the guidelines reflect the best science and to that end EPA will consider all aspects to continue to provide a sound and scientifically based methodology.

28. *Comment:* Comment was received that the aquatic life criteria and guideline methodology, contrary to EPA's assertions, have not undergone sufficient scientific peer review.

Response: EPA does not agree. The criteria and underlying methodology guidelines were widely distributed to interested parties. These drafts were made available to and thoroughly discussed with experts within EPA, industry, and academia. These interactions have provided many useful comments and information which greatly improved the scientific basis of the criteria and methodologies. The methodologies were further reviewed by an independent Science Advisory Board which EPA considers to constitute external peer review. (SAB Water Quality Criteria, A Report of the Water Quality Criteria Subcommittee, April 1985). The SAB noted that since EPA's initial efforts in developing water quality criteria, the process has undergone considerable evolution. The SAB felt that each revision represented a more sophisticated and realistic approach. EPA encourages and makes every reasonable attempt to include as much of the scientific community as practical in carrying out its responsibility under the Clean Water Act.

29. *Comment:* Comment was received that EPA states in the proposal that the

methodology for developing aquatic life criteria have been approved by the Science Advisory Board (SAB); however this approval was not unqualified.

Response: In its comments on EPA's 1985 guidelines, the SAB committee noted that EPA had developed a more scientifically sophisticated and realistic set of guidelines. (SAB Water Quality Criteria, A Report of the Water Quality Criteria Subcommittee, April 1985.) It noted approvingly that EPA considers such issues as mode of exposure, level of protectiveness and ecosystem protection. It further noted that the guidelines took advantage of advances in recent scientific research. The report, being a critique, did note areas where the guidelines could be improved and areas where additional research might be helpful. Overall the SAB report was supportive of the Agency's aquatic life criteria development guidelines.

30. *Comment:* Numerous comments were received with regard to the metals criteria. It was noted that the draft rule did not make clear what analytical method was to be used for implementation and that metals criteria should not be interpreted in terms of total recoverable or acid soluble metal. It was asserted that dissolved criteria would be more appropriate, and in many cases effluent limits based on dissolved metals only would be more appropriate. Many commenters urged that the rule should implement the metals criteria using the site-specific water-effect ratio, in order to target the bioavailable fraction of pollutant.

Moreover, it was asserted that the copper criteria document states that organic carbon has a strong effect in reducing copper toxicity, and that the copper criterion should be recalculated for waters having TOC greater than 2-3 mg/L. Furthermore, it was argued, the toxicity of several metals are related to pH, total organic carbon (TOC), speciation, as well as the hardness.

The commenters asserted that the criteria are overly protective when applied to the field, and are overly protective because they are not site-specific.

Another commenter argued that the criteria are underprotective because they do not account for synergism or additive effects.

Response: These diverse and recurring comments have been aggregated above because they deal in large measure with the phenomenon that the same metal concentration may cause different toxicity from place to place due to chemical differences from place to place. In natural waters metals may exist in a variety of dissolved and particulate forms. As discussed

elsewhere in the preamble, the bioavailability and toxicity of a metal depends strongly on its exact physical and chemical form. See Section F.7. It also depends on the site-specific chemistry of the water, and on the other materials contained in the water.

Because of (a) the complexity of metals speciation, (b) the varying degrees of bioavailability and toxicity of the many forms and complexes, and (c) the additive, synergistic, and antagonistic influences of other materials in the water, there is no one chemical method that can assure that a unit of concentration measured in the field would always be toxicologically equivalent to a unit of concentration occurring in the laboratory toxicity tests underlying the criteria. Consequently, simply choosing a particular chemical method (such as total recoverable metal or dissolved metal) to measure attainment of the metals criteria would not assure the appropriateness of the criterion for the water chemistry of the various sites at which the criteria apply.

In response to comments, EPA is implementing the criteria in terms of total recoverable metal while calculating the criteria value using the water chemistry adjustment provided by the "water-effect ratio" procedure for certain metals as described and recommended in its current Guidance on Interpretation and Implementation of Aquatic Life Criteria for Metals, May 1992. This approach takes into account, directly, water characteristics such as total organic carbon, pH, metals speciation and hardness, as suggested by the commenter.

The water-effect ratio approach compares bioavailability and toxicity of a specific pollutant in receiving waters and in laboratory test waters. It involves running toxicity tests for at least two species, measuring LC50s for the pollutant using (a) the local receiving water collected from the site where the criterion is being implemented, and (b) laboratory toxicity testing water made comparable to the site water in terms of chemical hardness. Because the water-effect ratio procedure, described in the above referenced guidance, provides a biological measure of differences in water chemistry, the ratio between site water and lab water LC50s is used to adjust the national acute and chronic criteria to site-specific values.

Because the water-effect ratio is a comprehensive measure of differences in bioavailability and toxicity, including the differences between dissolved and particulate bioavailability, it will produce a more appropriate criterion than simply expressing the criteria as dissolved metal. Some metals, such as

copper and silver, can exist in a variety of dissolved forms that differ greatly in toxicity. The water-effect ratio is the best procedure EPA currently has for measuring such differences.

The water-effect ratio is also a reasonable method now available for accounting for synergistic and additive effects of pollutants. Regardless of whether a value less than or greater than one is measured for the water-effect ratio, synergistic and additive effects of other pollutants in the site water are working against the antagonistic effects of any metal binding agents present.

EPA recognizes that the comprehensive qualities of the water-effect ratio do come at a cost. The procedure will yield results that are locally the most appropriate, but it is more difficult and expensive than a purely chemical approach. Consequently, performing such an analysis is not mandatory. In the absence of acceptable data, the rule assigns the ratio a value of 1.0, which yields no change in the national criteria. The rule also stipulates that the water-effect ratio cannot be set at a value different than 1.0 unless such value protects the water body from the toxic effects of the pollutant, and is derived from suitable tests on samples appropriately representative of the water body. Consequently, inadequacies, uncertainties, or ambiguities in the data will also result in the water-effect ratio being set at 1.0.

The type of specific data needed to implement the method is described in guidance: The 1992 Guidance on Interpretation and Implementation of Aquatic Life Criteria for Metals, and the 1983 Water Quality Standards Handbook. As discussed in Section 7 of the preamble, EPA is currently developing more specific procedures and methods to assist States in implementing the water-effect ratio approach.

31. *Comment:* A commenter asserted that laboratory tests using artificial testing conditions have little or no direct applicability to actual discharges and receiving water situations, therefore the criteria are overprotective.

Response: Laboratory tests are not conducted in pure water and pollutants are not solely in a free ionic form (complexed by nothing but water). (For example, laboratory waters are described in some detail in various standard protocols for doing toxicity testing, e.g., American Society for Testing Materials (ASTM), Standard E729, "Practice for Conducting Acute Toxicity Tests with Fishes, Macroinvertebrates and Amphibians.") Laboratory waters have low, but still

significant, levels of organic carbon and suspended particles that are in the range of a significant number of receiving waters. In the case of heavy metals, for example, certain particulate forms may be partially bioavailable and particulate forms in effluents may become dissolved after discharge into receiving waters. It is not appropriate to attribute toxicity solely to a particular form of metal: This has never been clearly demonstrated for any metal, being only questionably inferred under very restrictive conditions. (See response to public comment for the 1980 Guidelines, comment nos. 17, 19, & 20; 45 FR 79359.)

Because water quality criteria are derived to be protective in almost all situations, they may be overprotective in some situations. Moreover, site water effects may be most prevalent for heavy metals, this rule thus provides for site-specific determination of criteria values for metals based on local water-effect ratios.

32. *Comment:* EPA's aquatic life criteria for metals do not take into account the effect that water chemistry and metals speciation has on toxicity. EPA should withdraw criteria (such as zinc and copper), and provide criteria that vary with pH, total organic carbon (TOC), and other factors that affect speciation and toxicity.

Response: While it is true that speciation and site water chemistry can modulate toxicity and that the national criteria do not account for most of these factors, we do not agree with the comment that we should withdraw the criteria. There is inadequate data on enough species and conditions to adjust for all important factors in the national criteria, although current work is trying to address this situation. However, this uncertainty is insufficient reason to not issue and apply criteria; criteria are sufficiently applicable without modification to most receiving waters and can be appropriately adjusted for other waters by the water-effect ratio approach. The purpose of water effect calculation is to provide a means for setting the value appropriate for the site-specific water chemistry, where sufficient data are available. By providing for such a calculation in the rule, the criteria thereby appropriately incorporate such factors.

33. *Comment:* EPA's aquatic life criteria do not take into account acclimation. As a result, the criteria are overly protective.

Response: Acclimation is the ability of organisms to tolerate higher concentrations or pollutants or other conditions, developed through an exposure to such chemical or condition

without apparent adverse effects. Studies with fish have not documented large changes in sensitivity because of acclimation effects, the typical factor being about two. Furthermore, significant changes have usually been reported under very restrictive and unusual exposure conditions—a prolonged exposure in a narrow concentration range near chronic toxicity values followed by a sharp rise to acutely toxic concentrations. Acclimation of individuals under most exposure conditions would be less and does not persist for long once exposures drop significantly below toxic levels. To try to account for such conditions in nationally applicable criteria is not feasible. Adaptation of populations can occur due to natural selection, but is not well described; in any event, it cannot be accounted for in any generally applied presumptive standard but only documented on a site specific basis.

34. *Comment:* Several commenters asserted that the metals criteria are below natural background levels, as shown by EPA's own studies. Thus, such criteria are overprotective and invalid.

Response: EPA studies which examine USGS data, appear to indicate that the natural background concentrations in undisturbed watersheds at times exceed the criteria for copper, lead, zinc, iron, and aluminum. However, recent work by USGS and by others (for example, Windom et al. in *Environ. Sci. Technol.* Vol. 25, 1137) indicates that much of this data, that is the copper, lead, and zinc data, are not valid. The measured concentrations of these metals are largely artifacts of external contamination of the sample during collection and processing. At this time USGS has suspended collecting data on these metals nationwide, until improved methods can be implemented in their central laboratories.

EPA notes that USGS generates a large portion of the data available for the nation's ambient waters, and that the federally approved protocols are used by a variety of other agencies that collect ambient data. Consequently, it appears likely that many waters may be improperly determined not to be attaining the metals criteria.

Based on USGS results, the data for the metals on the priority toxic pollutant list most likely to be affected by external contamination are arsenic, beryllium, cadmium, copper, mercury, lead, and zinc. The nickel data is unlikely to be affected. USGS suspects that filtering artifacts, rather than contamination, may produce anomalies in dissolved data for other metals not in

today's rule. USGS has not yet ascertained quality of its selenium and silver data. Moreover, EPA has reviewed the data used in establishing the EPA metals criteria and does not believe these criteria are affected by the analytical problems noted by USGS. (Erickson, 1992, personal communication, in EPA's record).

To assure the reliability of the data in the lower microgram per liter range, priority toxic pollutant metals should be sampled and analyzed using protocols that involve ultra-clean reagents, ultra-clean Teflon or polyethylene labware, and ultra-clean laboratory environments.

EPA is not aware of reliable analytical data showing excursion of aquatic life criteria by natural background concentrations of the metals covered by this rule.

35. *Comment:* Commenters asserted that the acute and chronic averaging periods are unnecessarily restrictive, and were set in an arbitrary manner. As the acute criteria are derived from 48-96 hour tests, the EPA's one-hour averaging period for acute criteria cannot be correct. As the chronic criteria are derived from 30-360 day tests, the EPA's four-day period for chronic criteria cannot be correct. Pollutant specific averaging periods should be used, based on the latest scientific information, including the 1983 work of Mancini (*Water Res.* 17: 1355), which dealt with the effects of time varying concentrations.

Response: The quality of ambient water typically varies in response to variations in effluent quality, stream flow, and other factors. Organisms in the receiving water are not experiencing essentially constant exposure as in laboratory bioassays, but fluctuating exposures which may include short periods of high concentrations potentially causing adverse effects. EPA's criteria formulations therefore include an exposure period for concentration averaging which must be sufficiently short to limit elevated concentrations that might cause harm to aquatic life.

The 1-hour average exposure for the criteria maximum concentration (CMC) was derived to protect against the effects of fast acting toxicants like ammonia and cyanide. Thus, short-term spike increases in certain of these toxicants have been observed to cause toxic effects. (See 1991 Technical Support Document, appendix D.)

The 4-day averaging period for the criteria continuous concentration (CCC) is based on the shortest duration in which chronic effects are sometimes observed for certain species and

toxicants. The most important consideration in establishing duration criteria is how long the exposure concentrations can exceed the criterion without affecting the endpoint of the test (e.g., survival, growth or reproduction). EPA believes 4 days should be fully protective even for the fastest acting toxicants.

The approach of Mancini (or similar modeling cited in Chapter 2 of EPA's Technical Support Document) is certainly a promising one for establishing averaging periods. It and similar methods are being evaluated for incorporation as options into new water quality criteria guidelines. However, the validity and applicability of these methods are still not completely resolved. Applying Mancini's model to available toxicity data forces an analyst to immediately deal with problems of delayed mortality and limitations on observation times. The fit of the model to data is also only approximate and requires professional judgment in appropriately applying it.

Because of such considerations, EPA's current approach remains reasonably protective and is therefore appropriate.

36. *Comment:* Commenters asserted that the three-year return interval is too stringent for marginal excursions of water quality criteria. As a result the criteria are overprotective. It is argued that: EPA's Technical Support Document has cited information on recovery from severe or catastrophic acute stresses as the basis for its recommended return interval for both acute and chronic criteria; EPA's criteria, however, are intended to avoid even slight stresses; and cites on EPA draft staff analysis showing that a three-year return interval for slight excursions results in a billion-year return interval for a severe stress.

Response: EPA is promulgating its proposed general rules of applicability (40 CFR 131.36(c)(2)) for the return interval based on guidance contained in chapter 2 and appendix D of the TSD. As discussed in the TSD, EPA expects the three-year return interval to provide "a very high degree of protection" (TSD at page 36). The three-year return interval approximates the same degree of protection as a once-in-ten-year seven-day average low flow design condition (7Q10), the use of which has historical precedent and is in many State water quality standards. (*Id.*)

Given the state of the science, and the limitations of available data, EPA as a matter of policy, takes the position that it should assure adequate protection and takes a conservative approach. This policy is also consistent with and recognizes historic program practices

and procedures used by both the Agency and the States in implementing the water quality standards and related implementation programs. (Guidelines for Developing or Revising Water Quality Standards, April 1973, p.7.)

The draft EPA staff analysis referred to by the commenter was prepared solely as background information for discussions by the committee reviewing the methodological guidelines. EPA neither confirms or rejects the calculations.

37. *Comment:* The Guidelines indicate that criteria may be derived using data that have not undergone formal peer review, but the Guidelines do not offer meaningful guidance to determine the acceptability of test results. Inappropriate data are used to derive criteria.

Response: Toxicity tests methods have changed over time to improve precision and accuracy. This requires use of judgment in evaluation of test acceptability and results. EPA utilizes the Guidelines and professional judgment to reject unacceptable data (see Unused Data sections of Criteria Documents). Reservations about data are considered when judging acceptability of results in the context of criteria development. EPA also receives public comments on the criteria documents.

EPA's criteria for accepting or rejecting data do not depend on whether the data were published in peer-reviewed journals. The guidance provided in the 1985 Guidelines is predicated on more explicit review considerations than may be provided by most publishers of peer-reviewed journals addressing toxicity tests with aquatic organisms. EPA has observed that the public comments have also raised specific technical issues regarding the validity of peer-reviewed results.

Occasionally values in publications are not used because they are not biologically important or statistically different. In addition, recalculation of authors raw data may occur. This is part of the judgment required by criteria document preparers.

All published and unpublished references cited in aquatic life criteria documents are on file at EPA's Duluth or Narragansett laboratories.

38. *Comment:* A commenter asserted that analysis indicates that databases that have few genus mean acute values (GMAVs) produce significantly more restrictive final acute values (FAVs). The commenter asserts that EPA needs to increase the size of such databases to avoid promulgation of excessively restrictive water quality criteria.

Response: This comment summarizes hypothetical calculations in which the effect of the number of tested genera on the FAV were examined. It concludes that because the FAV changes as this number changes, the database size is insufficient.

EPA disagrees with the commenter's interpretation of the analysis. The commenter studied the effect of database size by changing the insensitive species while keeping the four most sensitive species the same (Commenter number 133, Appendix A., page 26). It is therefore quite expected and proper that the FAV would change as indicated. The FAV is designed to protect the fifth percentile in the sensitivity of organisms (see 1985 Guidelines, section IV, p. 26) (also 50 FR 30784, at pg. 30794; July 29, 1985). Using available suitable tests as representative of the species that are to be protected is the most reasonable feasible approach to establishing criteria values. If the sample size is 8, the four most sensitive values must be considered representative of half of the species that are to be protected and the fifth percentile would be expected to be somewhat below the lowest value. If the sample size is 32, the four most sensitive values are representative of the lowest 12.5% of the species and the fifth percentile would be expected to be near the middle of these values. And it is not just the fifth percentile that is expected to change but the entire distribution—for a sample size of 8 the mean will be near the highest of the four most sensitive values; for a sample size of 32 the mean would be far above the four most sensitive values (near the sixteenth most sensitive value).

Therefore, the response of the FAV cited in this comment is fully expected and appropriate; it in no way indicates a deficiency in the procedure or the database requirements. Similarly, the response of the FAV cited in site-specific calculations is also reasonable. If site calculations are based on fewer species and if these species tend to be more sensitive on average than the total dataset, the FAV should be lower.

39. *Comment:* A comment was received that most of the data used to derive the criteria were not developed for that purpose.

Response: The reason a toxicity test was originally conducted is not important. If the data are considered to be pertinent, of acceptable quality, and meet our protocols and other data requirements in the 1985 Guidelines, they should be used in the derivation of water quality criteria. Moreover, as stated in the 1985 Guidelines, p. 26, "confidence in a criterion usually

increases as the amount of pertinent data increases."

40. *Comment:* A commenter asserted that since EPA has acknowledged that species can exhibit a significant substance tolerance range and inter-laboratory variability, the databases for many of the criteria must be significantly improved before they can be considered suitable for use in the promulgation of water quality standards. The commenter cited Schimmel, S.C., 1981. Results: Interlaboratory Comparison—Acute Toxicity Tests Using Estuarine Organisms (EPA-600/4-81-001).

Response: Inter- and intra-laboratory variation is expected and unavoidable. Variation that causes imprecision is undesirable, but is not nearly as undesirable as is error that causes bias (Lemke, A.E.; 1981; Inter-Laboratory Acute Testing; EPA 600/3-87-005). More data are always desirable, and EPA welcomes the submission of additional high quality pertinent data, whether or not they have been peer-reviewed. The guidelines for deriving water quality criteria for aquatic life specify minimum data requirements that are intended to ensure reasonable confidence in the appropriateness of the resulting criteria.

The Science Advisory Board review referenced earlier at comment 29 accepted the EPA aquatic life 1985 Guidelines which permit the use of a single test to fulfill the minimum data base requirement. The results cited by the commenter when referring to a study conducted by Schimmel, 1981, were used by the Agency in developing the revised aquatic life guidelines in 1985. The guidelines specifically allow the use of a single-species test to fulfill the requirement for a species mean acute value. (1985 Guidelines, p. 29.)

41. *Comment:* A commenter asserted that very few of the studies used to develop the criteria cited any assessment of precision or accuracy and there was no standardization of testing protocols. Consequently, the commenter believes that the data are inadequate for the promulgation of water quality standards; and that only data from current testing protocols should be used.

Response: There is no way to fully assess the accuracy of a toxicity test because the "real" toxicity of the test material cannot be known. Various lines of evidence including results of toxicity tests and correlations between species and between test materials can help increase confidence in an estimate of toxicity. Studies of inter- and intra-laboratory variation are conducted to allow assessments of precision. Very

few, if any, studies are perfect, even if they exactly followed a "current testing protocol"; the acceptability of each study must be judged individually. Studies that follow approved methodology are more likely to be high quality, but some are not; some studies that deviate from approved methodology do provide useful information.

42. *Comment:* A commenter suggested that EPA provided no data to support its contention that acute-chronic ratios are similar in fresh and salt water.

Response: As quoted by the commenter, the 1985 Guidelines, p. 15, states that "When data are available to indicate that these ratios and factors are probably similar, they are used interchangeably." The guidelines do not contend that acute-chronic ratios are similar; the guidelines state that the ratios should be considered similar only when data are available to support the decision of similarity. Ratios are usually considered to be dissimilar if the range is greater than a factor of 10 (1985 Guidelines, p. 45).

43. *Comment:* A commenter asserted that EPA should establish a separate warm-water cadmium criterion, because the national criterion is set based on rainbow trout, a cold-water fish.

Response: The commenter misconstrues EPA's criteria development protocol. EPA's aquatic life guidelines require data for the family Salmonidae as one of the minimum eight species required to calculate a water quality criterion (1985 Guidelines, Section III, p. 23). EPA did not base its criteria for cadmium solely on rainbow trout data. (Rainbow trout is a member of the family Salmonidae.) EPA used this data to meet one of the requirements for tested species required by the guidelines (Ambient Water Quality Criteria for Cadmium-1984, Table 2, p. 6). Moreover, a review of toxicity data in EPA's criteria document does not indicate that the sensitivities of so-called coldwater for warmwater species differ significantly (Ambient Water Quality Criteria for Cadmium-1984, Table 2, pp. 46-47). EPA had no scientific basis to develop separate cadmium criteria based on the division of aquatic species into coldwater or warmwater types.

44. *Comment:* A commenter argued that because EPA did not follow its own Guidelines, EPA should withdraw the lead criteria document, update and complete the species database, and recalculate an appropriate freshwater lead criterion.

Response: EPA recognizes that the lead criterion is based on seven rather than eight freshwater acute tests as

recommended in the aquatic life guidelines. EPA has determined that the criteria are valid and that an additional test would not cause a sufficiently large change in the criteria (in the computation formula [see page 97, appendix 2 of the Aquatic Life Guidelines] increasing N, the number of species tested, by one with an LC50 value that is higher than the four most sensitive values only increases the acute criterion from 34 to 37 µg/l, at a hardness of 50). (See Memorandum to the Record, Kennard Potts, March 12, 1992.) This change does not warrant withdrawing the current criteria. This decision to establish the criterion based on seven tests is consistent with Section 12—Final Review, paragraph B, page 57 of the Guidelines, which allow "On the basis of all available pertinent laboratory and field information, determine if the criterion is consistent with sound scientific evidence. If it is not, another criterion, either higher or lower, should be derived using appropriate modifications of these Guidelines."

45. *Comment:* A commenter asserted that there is a significant error in the lead saltwater acute database, and it has implications on the validity (or lack thereof) of the saltwater acute-chronic ratio for lead.

Response: EPA recognized the error in the ambient water quality criteria document for lead in the genus mean acute value (GMAV) for *Fundulus* and corrected that error in the criteria matrix included in the proposed rule. The result of this correction was to increase the criteria maximum concentration (CMC) to 220 µg/l and criteria continuous concentration (CCC) to 8.5 µg/l.

The use of the acute-chronic ratio (ACR) of 51.29 for lead is reasonable, given the available information (see p. 9, Ambient Water Quality Criteria for Lead). The GMAV for *Mysidopsis* included in the criteria document for lead (p. 26), is ranked 7th of the 11 genera tested for lead toxicity. Therefore, *Mysidopsis* might be considered among the less sensitive genera as suggested by the commenter. However, the GMAV for *Mysidopsis* is less than 10 times the value for *Mytilus* suggesting the acute sensitivities of two genera are not greatly different. (*Ibid.*)

Other factors are more important than species sensitivity in selecting the final acute to chronic ratio (FACR) for lead. EPA did not believe that the data from chronic tests with freshwater species clearly demonstrated that acute-chronic ratios changed with acute sensitivity for the following reason. Acute values for the copepod (*Acartia*), amphipod

(*Ampelisca*) and dungeness crab (*Cancer*) are within a factor of less than 2 times the value for *Mytilus*. EPA then assumed that the ratio was not related to acute sensitivity. Even if an ACR of 2.0 could be justified for larval molluscs and lead, this value should not be applied to crustaceans when an experimentally derived value for *Mysidopsis* and *Daphnia* are available. See Table 3, Ambient Water Quality Criteria for Lead.

The commenter felt EPA was inconsistent in its use of ACR values from toxicity tests and the ACR of 2.0, when the most acutely sensitive organism is larval molluscs. EPA used acute-chronic ratios from toxicity tests for lead and silver and the value of 2.0 for copper (see ambient water quality criteria documents for lead and copper, and the draft water quality criteria document for silver, 55 FR 19988, May 14, 1990). The reason experimental ACR values were selected for lead instead of the value of 2.0 are described above.

46. *Comment:* A commenter suggested that the saltwater silver criterion is not valid and submitted test results to support this claim.

Response: Some of the data presented by the commenter (Number 80) to show problems in the silver data base actually supports its validity. Acute and chronic values for *Mysidopsis* are within the range reported by others. Silver's acute toxicity to sheepshead minnows is at silver's solubility. This probably accounts for the large range in reported silver toxicity. For these species only flow-through tests with measured silver concentrations were used. The data submitted in the public comment did not include information on the test conditions, and would not be used in criteria derivation without that information. See Ambient Water Quality Criteria Document for Silver, 1980; see also draft criteria document referenced in 55 FR 19988, May 14, 1990.

Results from silver tests from Cardin (1986) where control mortalities exceeded 10% were not used. In tests with copepods and larval silversides and flounder, control mortality of <20% is judged acceptable by those who conduct tests with fragile life stages of these species. Control survival requirements for chronic tests (ASTM protocol) are more liberal than those for acute tests.

EPA's rapid chronic toxicity protocols are not appropriate test methods for deriving chronic values for water quality criteria derivation because they are not true chronic tests. Only early life-stage tests with fish and partial and entire life-cycle tests with fishes and invertebrates are acceptable as provided

for in the 1985 Guidelines, section VI, part E, pages 37-39.

47. *Comment:* Comment was received that the proposed silver numeric standards should be revised to apply to the free silver ion. The commenter asserted that available information demonstrates that only the free silver ion is highly toxic to aquatic organisms while most other common forms of silver, whether soluble or insoluble, are several orders of magnitude less toxic.

Response: It would be appropriate to interpret the criterion in terms of the free silver ion only if all the silver that was included in the measured or nominal concentrations of silver in the pertinent toxicity tests would have been measured as free silver ion. Some silver would be complexed by such things as chloride, hydroxide, or carbonate in acute toxicity tests. Moreover, the feeding of the organisms in the chronic tests would result in complexation of at least some silver. This has been postulated as the explanation as to why (a) the addition of food to an acute toxicity test raises the EC50 for daphnids and (b) silver has appeared to be more toxic to daphnids in some acute toxicity tests than in comparable chronic tests. Absent a criterion that correctly applies to the free silver ion, the water-effect ratio procedure incorporated into today's rule is an appropriate means to deal with differences in toxicity caused by silver speciation.

48. *Comment:* A comment was made that the numeric silver standards should not be proposed until EPA's May 14, 1990 proposed revisions to the current ambient silver water quality criteria are finalized to reflect comments about the current science as submitted for the record of that proposal.

Response: EPA agrees with some of the comments on the May 14, 1990 proposed silver criteria. As a result, additional testing is planned and a revised document for silver will be prepared, but this is not anticipated in the near future. With this rule, EPA is promulgating its 1980 criteria for silver, because the Agency believes the criteria is protective and within the acceptable range based on uncertainties associated with deriving water quality criteria. In addition, the water-effect ratio promulgated in this rule offers development of appropriate site-specific criteria.

49. *Comment:* A commenter asserted that in the studies of Calabrese and Nelson 1974, Calabrese et al. 1973, and Coglianesi 1982, the properties of the dilution water significantly affected the metals toxicity.

Response: EPA agrees that there may be differences in metals toxicity between laboratory test waters and ambient waters. For this reason, EPA has incorporated use of water-effect ratios in this rule (see Section F-7 of this preamble and an earlier response to public comment).

50. *Comment:* A comment was made that EPA should not use the metals toxicity data from Dinnel et al. 1983, who were evaluating alternative conditions in order to refine the testing protocol.

Response: EPA disagrees. Valid toxicity data can come from tests used to develop test methodologies and EPA determined that the Dinnel, et al. toxicity data was valid toxicity data. For example, see draft Ambient Water Quality Criteria for Silver, September 24, 1987.

51. *Comment:* A commenter argued that the metals toxicity data from Eisler 1977 are not valid because they involve 168-hour static tests. The currently recommended maximum duration for such tests is 48 hours.

Response: EPA disagrees. Most values reported in criteria documents are 96-hour LC50s for adult clams. EPA considers the Eisler data to be from valid and reliable tests even though they were based on other than 96-hour tests.

52. *Comment:* Comment was received that the 20-25 degree Celsius temperatures and 12:12 hour light cycle used to obtain the metals toxicity data of Lussier 1985, do not match current mysid protocol's 26-27 degree Celsius temperature and 16 hour light:8 hour dark light cycle.

Response: The submitted comments provided no data to show the effect of temperature or lighting on the chronic value. EPA does not consider Lussier's results to be artifacts because test conditions duplicate conditions found in nature.

53. *Comment:* The zinc and chromium toxicity data of Nelson 1972 should not be used because it involves an endpoint not recognized by EPA approved protocols.

Response: EPA disagrees. The test endpoint (the development of a hinge after 48 hours) is the same as that of the American Society for Testing Materials (ASTM), which is a standard, recognized protocol.

C. Human Health Criteria

The guideline references in the subsection refer to Guidelines and Methodology Used in the Preparation of Health Effect Assessment Chapters of the Consent Decree Water Quality Criteria Documents, 45 FR 79347, November 28, 1980. The short reference

in this sub-section is "the 1980 Guidelines."

54. *Comment:* A comment was received that use of the harmonic mean flow is a new technique and is not consistent with the way sampling is in fact done.

Response: Harmonic mean flow determinations have been adopted because the underlying hydrology support this analytical procedure. Such flows are applied only to human health criteria where human exposure is expected over a long period of time. It is derived by analyzing the pollutant mass a consumer would receive by, for example, consuming a uniform amount of water everyday from a natural waterbody receiving a uniform mass loading of a pollutant.

Theoretical development as shown in the reference cited in footnote 2 of the preamble of the proposed rule (56 FR 58438) demonstrates that actual human exposure is best ascertained by using harmonic mean flow to account for concentration variation in computing the actual exposure to a pollutant.

55. *Comment:* The exposure assumptions used by EPA in developing human health criteria do not account for the variability of the population nor the consideration of exposure to more than one chemical and more than one exposure route.

Response: The EPA assumed exposure model was based on estimates or measures of national norms (see preamble discussion on human health criteria, Section F-3 and 1980 Guidelines, 45 FR 79347, Nov. 28, 1980). EPA has suggested in these and other documents that States select more appropriate fish and other aquatic life consumption rates for local populations. Some States have done so.

EPA's risk calculations aim to protect individuals exposed at an average level (*Ibid*). Thus, EPA does the calculation for average daily consumption of 2 liters of water and 6.5 grams of aquatic life for a 70 kg size individual over a 70-year lifetime. Then the Agency selects a conservative risk level (e.g., 10^{-6} or 10^{-5}) for such an average person.

People who do not fit this norm are subjected to more or less exposure to the pollutants of concern. For example, assuming a criterion based on a 10^{-6} risk level, a person who consumes 65 grams of contaminated aquatic life per day from ambient water at the criterion level would be protected at the 10^{-5} risk level, still well within EPA's desired risk range.

The effects of multiple toxicants is a more difficult problem. The science of toxicology has not developed generic ways to combine multiple risks. For

specific chemicals, analysis would focus on whether the same organ and mode of toxicity were implicated. For example, it may be more significant if two chemicals both caused liver cancer as compared with a situation where one chemical was carcinogenic and the other caused other systemic effects. Thus, a case-by-case approach is currently the only feasible approach available.

EPA has clearly delineated the human health models it uses. That is, one for systemic toxicity and one for carcinogenicity. The Agency's accepted factors are available in the Integrated Risk Information System (IRIS) and in the section 304(a) water quality criteria documents, and in the 1980 Guidelines, page 79353. Locally specific risk can be estimated using the readily available information based on monitoring data for local public water supplies or fish tissue analysis for specific chemicals.

However, in a rule affecting large areas of the country, EPA's view is that it should focus on the average exposure, as a protective basis for this rule. States may take subsequent action to provide the means to account for specific cases. This rule attains that goal.

56. *Comment:* Since EPA is undertaking a dioxin reassessment, it should not be included in this rule.

Response: We believe there are sound reasons for proceeding to promulgate dioxin criteria. First, the dioxin criteria are within the range of scientific defensibility. EPA's action will also encourage and support the fourteen States now considering adopting a dioxin criterion to complete their action. Most of those States are relying on the same data used by EPA to derive its criterion. Individual Control Strategies developed under section 304(l) of the Act contain limits on dioxin as appropriate, so there will be no immediate impact from this promulgation. It is too early in the process of scientific reassessment to support major changes in either the substance or timing of regulatory decisions related to dioxin.

It should also be pointed out that 42 states and territories have adopted criteria or translator procedures for dioxin; EPA approved 40 of those actions.

57. *Comment:* Several commenters raised questions concerning the methodology used to develop the human health criteria. Some stated that the CWA methodology did not reflect changes in risk assessment and therefore was obsolete. Some commenters noted the differences between the risk ranges under the CWA and the SDWA and argued that the acceptable range of

cancer risk should be the same under both statutes. Several commenters discussed specific contaminants and argued that the regulatory levels under the CWA and SDWA should be the same. One commenter provided a list of contaminants where drinking water standards were more stringent than the proposed criteria and urged that criteria should be established equal to drinking water MCLs.

Response: EPA has developed risk assessment methodologies to protect human health from contaminants in drinking water and ambient waters. Although there are some differences in the methodologies, both are scientifically defensible. Both methodologies stem from Agency risk assessment values for noncancer effects (the Reference Dose or Rfd) and for cancer effects (the cancer potency factor, q1*). See Water Quality Criteria documents (the 1980 Guidelines), 45 FR 793180 (November 28, 1980) and 56 FR 3526 (January 30, 1991) (SDWA Phase II regulations).

Both methodologies follow the Agency's Guidelines for Carcinogen Risk Assessment (the Cancer Guidelines). 51 FR 33992 (September 24, 1986). Under both programs, the Agency takes the position that there is no threshold for carcinogenic effect unless there is convincing evidence to the contrary. Both programs therefore recommend that contaminant concentration for carcinogens should be zero based on this "no threshold" presumption. See SDWA Phase II regulations at 56 FR 3533 and the 1980 Guidelines at 45 FR 79324.

The nature of the human exposure to contaminants is somewhat different in the two programs, and the assumptions used in the methodologies reflect those differences. Under the SDWA, it is protection from exposure to contaminants in drinking water that is the concern. The maximum contaminant level goals (MCLGs) reflect the level of contamination where "no known or anticipated adverse effects on the health of persons occurs and which allows an adequate margin of safety." 42 U.S.C. 300g-1(b)(4). For those contaminants that are not suspected of posing carcinogenic risk for drinking water, the Agency bases the MCLG on noncancer effects and adjusts the Rfd to reflect drinking water consumption of an average of two liters of tap water per day by a 70 kg adult. This value is further adjusted by exposure assumptions; the key assumption in the drinking water program is that significant exposure to a contaminant comes from sources other than drinking water (e.g., ingestion of food,

inhalation), and it is prudent to allow for the contingency that other exposure may occur. While EPA uses actual exposure data where they are available, the Agency assumes, as a default position, that drinking water contributes 20%–80% of the total exposure to a contaminant. 56 FR 3532. MCLs can also be adjusted for non-health reasons, such as treatability and detectability.

Under CWA section 304(a), EPA developed human health criteria to protect for exposure to ambient water contaminants. In this case, exposure comes from ingestion of surface water and consumption of aquatic organisms which are assumed to have bioconcentrated pollutants from the water in which they live. Accordingly, the 1980 Guidelines assumes the consumption of two liters of water and the ingestion of 6.5 grams of fish per day, and the bioconcentration potential of a contaminant in fish tissue may be a significant factor in the human health criteria value. The exposure assumption in the 1980 Guidelines differs from that in the drinking water program. If data were available on exposure to a contaminant from other media such as air or non-aquatic diet, such data could be used in setting criteria. Absent such data, EPA assumes, as a default position, that ambient water (i.e., aquatic exposure and organism ingestion) contributes 100% of the exposure to a contaminant. 1980 Guidelines, 45 FR 79323. EPA considers both methods to be protective of human health for their respective exposure scenarios.

EPA agrees with commenters that the Agency has chosen somewhat different risk levels in the two programs for determining MCLs and criteria for carcinogens, but does not agree that the different levels indicate major scientific differences. Under the SDWA, it is EPA policy to establish MCLs at a range associated with excess risks of one in ten thousand (10^{-4}) to one in one million (10^{-6}). In the CWA water quality criteria documents, the Agency presents a range of concentrations corresponding to incremental cancer risks of one in one hundred thousand (10^{-3}) to one in ten million (10^{-7}); the risk ranges are presented only as information. Under the usual process in which States develop water quality criteria, the risk management decision on an appropriate risk level is made by each State. In these circumstances, States have the flexibility to choose a risk level as long as the decision is well documented, was subject to public notice and comment, and protects water uses. In this rulemaking, EPA proposed criteria with an incremental cancer risk level of one

in a million (10^{-6}) for carcinogens.

Today's action promulgates a risk level for each State to reflect the State's risk management decision where such a decision is discernable. See discussion in section F-5 of the preamble. In the Agency's view, the considerable overlap between the risk ranges in the two programs indicates that they are not significantly different.

Accordingly, EPA does not agree with commenters' arguments that the Agency must have identical risk assessments under the CWA and SDWA. At the same time, the Agency is studying the extent to which both methodologies might start with the same presumptions. If any changes to the methodologies seem appropriate, the changes would be proposed for public comment. In the meantime, because both methodologies stem from the same Agency risk assessment values, RfD and $q1^*$, they are considered appropriate for deriving human health criteria for water contaminants. Therefore, as a general matter, EPA does not intend to revise the human health criteria unless and until there are changes in the 304(a) methodology.

One commenter urged the Agency to establish human health criteria equal to MCLs when the 304(a) methodology resulted in less stringent criteria. The commenter provided a list of contaminants for which the proposed criteria are less stringent than proposed or promulgated drinking water regulations for the contaminants (MCLs), and recommended that EPA promulgate water quality criteria equal to the MCLs for antimony, cadmium, nickel, selenium, silver, thallium, cyanide, ethylbenzene, toluene, 1,1,1-trichloroethane, benzylbutylphthalate, hexachlorocyclopentadiene, and 1,2,4-trichlorobenzene. EPA notes that there are five other contaminants in this proposed rulemaking for which the SDWA regulatory levels (either final or proposed) are more stringent than the proposed human health criteria; these are chromium, lead, chlorobenzene, trans-1, 2-dichloroethylene, and o-dichlorobenzene.

The fact that the numeric standards for these contaminants are different under the two programs is not a sufficient basis for replacing the proposed human health criteria with criteria equal to the MCLs. As discussed above, the methods used to derive the human health values under both the SDWA and the CWA are generally considered protective of human health. The differences that occur in the regulatory standards under the two statutes result from the assumptions used in their respective methodologies,

particularly the default values chosen to estimate exposure. These assumptions are reasonable policy choices for implementing the statutory directives of the two programs. Since the CWA section 1980 Guidelines are adequately protective of human health, EPA does not consider it necessary to undertake a large scale revision of the proposed criteria in this rule to make them correspond to the SDWA standards. Moreover, EPA does not agree that MCLs are an appropriate value for a human health criterion since MCLs are partially based on feasibility considerations, including the availability of technology to achieve the regulatory level and the cost of such treatment. It is the MCLG that reflects solely health considerations. Accordingly, the Agency will not promulgate criteria equal to MCLs in lieu of less stringent proposed human health criteria. Except as noted below, the human health criteria are promulgated as proposed.

The Agency does find it necessary to withdraw the proposed human health criteria for seven contaminants pending further consideration. In the case of three contaminants—1,1,1-trichloroethane, methyl chloride, and lead—there is currently an insufficient basis for calculating human health criteria. For cadmium, chromium, selenium, and beryllium, the proposed criteria are no longer scientifically defensible. EPA is withdrawing the criteria while it evaluates all relevant data regarding the toxicity of these contaminants. The Agency's basis for deferring action on the human health criteria for these contaminants is discussed further below. For several of these contaminants, the Agency is today promulgating aquatic life criteria that are more stringent than the proposed human health criteria. However, the Agency recognizes that in limited circumstances, there might be regulatory voids in the absence of promulgated human health criteria. To minimize this potential problem, the Agency has added a footnote, footnote n, to the table setting out the criteria in § 131.36(b) that directs permit authorities to specifically address these contaminants in NPDES permit actions using the States' existing narrative "free from toxicity" criteria.

(A). 1,1,1-Trichloroethane

No public comments were received on the proposed human health criteria for this contaminant. However, in response to other comments, EPA evaluated the proposed criteria and has decided not to promulgate human health criteria. EPA proposed the human health criteria using an RfD based on inhalation data.

However, the Agency has withdrawn that RfD from the IRIS database since it is generally not appropriate to use inhalation data to estimate oral risk. As noted above, EPA bases the proposed criteria on Agency-wide RfDs in IRIS. Since no such RfD currently exists, there is no basis to support the proposed values.

(B). Methyl Chloride

58. *Comment:* A commenter stated that the criteria should not be based on carcinogenicity but on systemic toxicity. Another commenter stated that it is inappropriate to establish criteria for methyl chloride based on the carcinogenicity for chloroform.

Response: EPA agrees there are now data available on methyl chloride itself, and it is no longer scientifically defensible to rely on surrogate data for chloroform. EPA is currently evaluating a $q1^*$ and RfD for methyl chloride for developing an RfD. In view of the availability of chemical specific data and the ongoing risk assessment process, EPA does not believe it is appropriate to promulgate human health criteria for methyl chloride at this time.

(C). Selenium

59. *Comment:* One commenter noted that in the case of selenium, EPA proposed a human health criterion of 100 ug/l even though the current MCL for selenium is 50 ug/l (the same as the MCLG). The commenter believes the numbers should be the same and urged EPA to set the human health criterion at the MCL.

Response: As discussed above, EPA does not intend to replace proposed criteria with criteria equal to the MCL solely because the latter is the more stringent level. However, in the case of selenium, the Agency has determined that further consideration should be given to recent data on selenium before setting the human health criteria. Selenium is an essential nutrient in humans and plays a vital role in cell metabolism. See Health Criteria Document for Selenium, (May 1989). In such instances, the Agency must evaluate evidence of the compound's essentiality as well as evidence of toxicological effects. The Agency's Science Advisory Board has noted that synergistic effects—the interaction between selenium and other inorganic chemicals—are an important consideration in determining regulatory standards. Moreover, there are individuals who, whether from diet or supplements, consume significantly more selenium than EPA estimates of average consumption levels.

During the development of drinking water regulations for selenium, the Agency discussed new epidemiological data that were becoming available. See 56 FR 3526 at 3538-39 (January 30, 1991). In view of these new data, the numerous complex issues concerning essentiality, the consumption of elevated levels by some members of the population, and the need to ensure a protective level, EPA is unable to determine the scientific defensibility of the human health criteria, and therefore will not promulgate human health criteria for selenium at this time.

(D). Beryllium

60. *Comment:* One commenter stated that EPA's beryllium criterion is too low (i.e., 0.0077 ug/l). The commenter alleged three serious flaws in the proposed criterion for beryllium. These are: (1) Beryllium does not pose a carcinogenic risk by ingestion; (2) EPA's use of animal inhalation and injection data to support a cancer risk by human ingestion is arbitrary and capricious and is not consistent with EPA's methodology in setting human health criteria for other metals; and (3) the proposed criteria are less than natural ambient levels as well as EPA's proposed drinking water standards and would have very significant and unwarranted economic impacts.

The commenter further argued the defects in the data upon which EPA relies are so fundamental that the classification of beryllium as a Group B2 substance is unreasonable; and the EPA should classify beryllium in Group D for purposes of its potential ingestion carcinogenicity, and should adopt a human health criterion for beryllium of 1.6 mg/l, based upon a no-observed adverse effects calculation for a non-carcinogenic substance. Information on the Agency's classification system for carcinogens is included in U.S. Environmental Protection Agency (EPA), 1986, Guidelines for Carcinogen Risk Assessment. 51 FR 33992, September 24, 1986.

Response: EPA does not agree with the commenter's argument that the Agency's weight of evidence classification of beryllium as a B2 carcinogen is incorrect. There is clear evidence of carcinogenicity through inhalation or injection in monkeys, rats and rabbits, and animal studies showing tumors at sites different from the route of exposure. On this basis, the Agency has concluded that the overall weight of evidence in beryllium studies proves sufficient evidence of carcinogenicity to support a B2 classification. Drinking Water Criteria Document for Beryllium, September 1991. However, the Agency

has determined that it is necessary to give further consideration to the toxicity and carcinogenicity of beryllium through ingestion before promulgating human health criteria. In the final drinking water rulemaking regarding beryllium (see 57 FR 31776, July 17, 1992), Agency analysis of the ingestion route of exposure failed to provide definitive evidence that correlates ingestion with tumor appearance. Drinking Water Criteria Document at I-7. The Agency has determined that these ingestion analyses are relevant in this rulemaking and therefore the proposed criteria are not scientifically defensible. The Agency will give additional consideration to the question of whether beryllium in water could pose a carcinogenic risk to humans before issuing criteria and accordingly, will not promulgate criteria for beryllium.

(E). Lead

61. *Comment:* A commenter noted that EPA proposed a 50 ppb lead human health criteria for consumption of water and organisms. The commenter argued that a 50 ppb criteria is not compatible with EPA's overall lead control strategy reflected under the drinking water standards, and recommended a 5 ppb lead health criteria.

Response: As noted above, differences in the proposed human health criteria and regulatory levels under the SDWA methodology are not, in themselves sufficient basis for revising the criteria. In this case, the original basis for the 1980 Guidelines and, in turn, the proposed criteria was however the MCL. In 1991, EPA promulgated a zero MCLG and treatment technique for lead in drinking water, which will, when effective, replace the current MCL. The treatment technique includes a 15 ppb lead action level at the tap.

In view of drinking water regulatory action, EPA has determined that it is not appropriate to promulgate a human health criteria based on a drinking water MCL that no longer reflects the Agency's position. The Agency has given preliminary consideration to other numeric values but has not yet reached a consensus on an appropriate human health criteria. Accordingly, EPA is not promulgating human health criteria for lead at this time.

(F). Cadmium

62. *Comment:* A commenter noted that EPA had proposed criteria for cadmium that were less stringent than the MCLs. The commenter urged EPA to set the criteria at the MCL level.

Response: As noted above, differences in the two regulatory levels is not a

sufficient basis for using the more stringent MCL. However, the Agency has determined that it is necessary to give further consideration to the toxicity of cadmium from exposure to water in terms of the bioconcentration potential of this contaminant. As discussed earlier, one of the factors used to calculate the human health criteria is consumption of aquatic organisms. It is, therefore, particularly important that the Agency ensure that the criteria adequately reflect the bioconcentration of cadmium. EPA is currently addressing this issue in other regulatory actions (e.g., sewage sludge and the Great Lakes initiative) and expects that the data and analyses being developed in these efforts will be of value in further examination of the human health criteria. Accordingly, the proposed criteria are not scientifically defensible and EPA will not promulgate human health criteria for cadmium.

(G). Chromium

63. *Comment:* A commenter noted that in the case of chromium with valences of plus VI and III, EPA proposed human health criteria of 170 and 33,000 µg/l, but that the Agency had promulgated a total chromium MCL of 100 µg/l. The commenter urged the Agency to take a similar position here.

Response: As noted above, the fact that the numeric values for CWA and SDWA regulatory actions are different is not a sufficient basis for revising the CWA criteria. However, in this instance, EPA has determined that the proposed criteria are not scientifically defensible. New information concerning the conversion of chromium III to a more toxic chromium VI during the chlorination process should be considered in setting the criteria as well. (See 56 FR 3526 at 3737, January 30, 1991). Accordingly, EPA will not promulgate the proposed human health criteria for chromium.

For other reasons, proposed human health criteria were withdrawn for four pollutants.

(H). Silver

64. *Comment:* Several commenters stated that silver should no longer be classified as a toxic pollutant for human health concerns and that no further regulation for silver is appropriate. Commenters also addressed the issue that the proposed silver criteria should be revised to delete human health as a toxicity-based criterion to be consistent with the recent deletion of the MCL for silver under the Safe Drinking Water Act. (56 FR 3526, January 30, 1991.)

Response: EPA deleted the human health criteria for silver, because the

only potential adverse effect from exposure to silver in drinking water is argyria (a discoloration of the skin). EPA considers argyria a cosmetic effect since it does not impair body function. However, free silver ion is highly toxic to fish. Therefore, to protect aquatic life, silver will be regulated with aquatic life criteria as promulgated in today's rule.

(I). Acenaphthylene, Phenanthrene, Benzo(g,h,i)Perylene

65. *Comment:* Several comments were received which stated that (1) the EPA has expanded the list of polynuclear aromatic hydrocarbon (PAH) compounds to be regulated as carcinogens. Specifically, the commenters do not agree with the Agency that acenaphthylene, phenanthrene, benzo(g,h,i)perylene, and chrysene should be treated as carcinogens, and (2) the proposed rule establishes human health criteria for a diverse class of compounds (such as polynuclear aromatic hydrocarbons) based solely on structural similarity, and the assumption that all of the compounds are of equal toxicity to the most potent compound within the "class."

Response: The Agency agrees with the several comments that the water quality criteria for acenaphthylene, phenanthrene, and benzo(g,h,i)perylene should be based on non-carcinogenic effects of these chemicals since inadequate toxicity data are available to assess carcinogenic potential of these chemicals. However, there are insufficient toxicity data available to provide risk assessment for these three compounds at this time. Therefore, they have been deleted from this rule.

The Agency does not agree with the comment regarding chrysene. Chrysene has shown carcinogenicity in several animal studies. (U.S. EPA, 1991. Drinking Water Criteria Document for Polynuclear Aromatic Hydrocarbons (PAH's) Office of Water.) Chrysene produced tumors (as did other PAHs included in this rule) in several mouse strains when applied topically in assays for complete skin carcinogenicity or in initiation/promotion protocols. Several early studies employing intramuscular or subcutaneous injection of mice and rats produced negative or equivocal results. Three studies wherein neonatal mice of two strains were exposed intraperitoneally reported increased tumor incidence in liver and other sites (*ibid*). Chrysene produced mutations in *Salmonella* and chromosome aberrations and morphologic transformation in mammalian cells.

The Agency recognizes that carcinogenicity of various PAHs vary

with each PAH, however, Benzo(a)pyrene being the most potent carcinogen of this class, was used to develop criteria for all the PAHs.

(J). Other Pollutants

66. *Comment:* A commenter requested that EPA explain the origin of the use of safety (uncertainty) factors.

Response: The safety factors (now referred to as uncertainty factors [UF]) used in calculation of the Acceptable Daily Intake (now referred to as the Reference Dose [RfD]) were developed from the National Academy of Science guidelines (1977) with modification by the EPA. These factors are similar to those used by the World Health Organization (Food Chemistry Toxicology, Vol. 27, No. 4, pp. 273-274, 1989). The EPA is presently working on new approaches to calculation (estimation) of a RfD (ADI).

The term "safety factor" (now UF) was initially used by the Food and Drug Administration (FDA). They used no-effect levels (in mg/kg of diet) from chronic animal feeding studies and divided by 100 to get an Acceptable Daily Intake (ADI) level. For less-than-lifetime (or sub-chronic) studies, they divided the no-effect level by 1000. The National Academy of Science recommended that EPA use a similar approach and outlined the use of 10-fold UFs for intra- and interspecies variation. An additional 10-fold UF is also included to calculate a lifetime number from a less-than-lifetime study. The term "RfD (Reference Dose)" is now used by the EPA instead of the ADI. The above referenced information is included in the Agency's Risk Assessment Guidelines published at 51 FR 33992, September 24, 1986.

67. *Comment:* A commenter stated that EPA should not use Structure-Activity Relationships (SAR) techniques to regulate chemicals, such as methyl chloride, when data on the specific chemical are available.

Response: The EPA uses SAR only when data on specific chemicals of a chemical group are lacking (see 1980 Guidelines, Section D, page 79355). SAR is a technique used to compare the toxicity of individual chemical in the group with the known toxicity of one member of the group based on chemical structural similarities. For example, SAR was used in criteria development for polynuclear aromatic hydrocarbons (PAHs), polychlorinated bi-phenyls (PCBs), and tri-halomethanes (THMs) because the EPA does not have adequate health data on most of the chemicals in the class under review. For a detailed discussion on methyl chloride, see previous comment.

68. *Comment:* A commenter stated that the toxicities of inorganic arsenic (As) and the organic arsenic derivatives present in fish may be quite different.

Response: EPA agrees with the commenter—the organic arsenic forms are known to be less acutely toxic than inorganic arsenic forms ("Threshold Carcinogenicity Using Arsenic as an Example," Advances In Modern Environmental Toxicology, 15:133-158, 1988). In addition, since the organic forms found in fish appear to be excreted as the parent molecules, they are likely to have less long-term toxicity. A footnote has been added to section 131.36(b) stating that the criteria for arsenic refers to the inorganic form only.

69. *Comment:* A commenter stated that the arsenic standard is based on an IRIS recalculation that has never been open for public inspection.

Response: The 0.018 µg/l (water and aquatic life consumption) and 0.14 µg/l (aquatic life consumption) criteria were calculated from the unit risk factor of 5×10^{-5} (µg/l)⁻¹. The unit risk factor of 5×10^{-5} (µg/l)⁻¹ is on IRIS and available for public inspection. Although EPA incorrectly indicated in the proposal that the criterion was calculated using an addendum to the prior criteria document and not IRIS, in fact the addendum included the IRIS information and this information was in the record. There is an IRIS submission desk for public comments. Moreover, this rulemaking provided an opportunity for public comment.

70. *Comment:* A commenter claims that the EPA's Science Advisory Board (SAB) is critical of EPA's criteria for arsenic.

Response: The SAB stated that "at doses below 200 to 250 µg As⁺³/person/day there is a possible detoxication mechanism" and recommended that EPA "develop a revised risk assessment based on estimates of the delivered dose on non-detoxified arsenic." (EPA-SAB-EHC-89-038. Letter from SAB to William Reilly, September 28, 1989.)

Since it is not known exactly when and how arsenic can be considered to be detoxified, EPA cannot, at present, calculate this "delivered non-detoxified" dose. It has been postulated by Marcus and Rispin ("Threshold carcinogenicity using arsenic as an example" Adv. Modern Environ. Toxicol. 15:133-158, 1988) that methylation is a detoxification process. While methylation certainly decreases the acute lethality of arsenic, we do not have enough toxicity data to regard the mono- and dimethylated methobolites as "non-toxic".

71. *Comment:* A commenter noted that no significant health effects from

arsenic exposure has been found in the U.S., as compared to the effects seen in Taiwan.

Response: The cancer potency for arsenic is calculated using standard Agency methods. The available U.S. epidemiology studies are small and do not have the statistical power to state whether the effects and risks in the U.S. are dissimilar to those that have been reported in Taiwan.

72. *Comment:* A commenter questioned the effects of arsenic at low dose and states that a threshold for arsenic may exist. The Marcus and Rispin paper is cited as justification. (Threshold Carcinogenicity Using Arsenic as an Example", "Advances in Modern Toxicology, 15:133-158, 1988.)

Response: There are no adequate data on whether arsenic exerts the same effects at low doses that it does at higher doses. To extrapolate to low dose effects, the EPA uses the linearized multistage model. At the present time, there is no substantial database which demonstrates that arsenic has a threshold for adverse effects. Marcus and Rispin theorized that there is a threshold for arsenic. However, there is no adequate proof that such a threshold exists. In addition, it should be noted that there is not an adequate epidemiology study on U.S. populations. Accordingly, at the present time, there is no way to establish the presence or absence of a threshold level for arsenic.

73. *Comment:* Arsenic causes skin cancer, and not all forms of skin cancer are equally lethal.

Response: The EPA knows that the form of skin cancer induced by Arsenic is treatable and agrees with the commenter that not all forms of cancer are equally lethal. However, the EPA is aware of data showing that arsenic can cause internal cancer and is reluctant to change the risk assessment based on skin cancer until the recent data can be evaluated (the Taiwan data).

74. *Comment:* EPA assumes that all forms of arsenic are equally carcinogenic and therefore the proposed criteria are overly conservative.

Response: The Agency does not consider all forms of arsenic to be equally carcinogenic and has clarified this issue by adding footnote "b" to the matrix in this rule.

75. *Comment:* Several commenters stated that the exposure assumptions or models used to generate ambient water quality criteria are extremely conservative for the following reasons: (1) 6.5 g/d reflects consumption of both contaminated and non-contaminated fish, (2) given the mobility of the population, drinking water from the

same source over an average lifetime is extremely remote, (3) the supposition that a person will be drinking water from a surface stream in the first place is questionable, and (4) criteria assume that the same person would actually be consuming "contaminated" water which should have been prohibited under the Safe Drinking Water Act.

Response: The EPA exposure model was based on estimates or measures of national averages (Seafood consumption data analysis, U.S. EPA. 1980—see Guidelines, page 79356). Data indicate that fish consumption rates for recreational and subsistence anglers can exceed 6.5 g/day. EPA has suggested that States select more appropriate fish and other aquatic life consumption rates for local populations. Some States have done so. (See TSD, p.37.) The commenter is correct that the 6.5 grams data reflects consumption of both contaminated and non-contaminated fish. The 6.5 grams is the quantitative daily aquatic life consumption used by EPA. However, EPA's methodology assumes that the 6.5 grams per day of aquatic life were taken from waters meeting the criteria level (see 1980 Guidelines, Section A, page 79348).

In EPA's view, the assumption that an individual may drink from the same surface water for their lifetime is reasonable and meets the goal of the CWA. Drinking water directly from surface supplies is not always regulated under the SDWA. There are many circumstances which are not regulated by the SDWA. SDWA regulations are only applicable to public water supplies serving populations of 25 people or more or in which there are 15 or more service connections.

76. *Comment:* Several commenters questioned the fish and water consumption rates of humans as related to the dioxin criteria.

Response: The Agency is reviewing the scientific basis for the human fish consumption factor used in the derivation of dioxin criteria. (56 FR 50903; October 9, 1991.) When these reviews are completed and the findings critically evaluated, the Agency will initiate a process to determine whether the criteria for dioxin should be revised.

77. *Comment:* Bioconcentration factors (BCFs) should be based on the proportion and type of organisms that would be non-migratory and likely to be caught and consumed by recreational fishermen.

Commenters disagreed with the way the BCF's were derived for 8 chemicals:

Antimony
Arsenic
Beryllium
Cadmium

Chromium
Mercury
Selenium
Thallium

Response: BCFs for all of the criteria, including the above cited metals were supplied by EPA's Duluth laboratory and were used to calculate the promulgated criteria (i.e., from the list above, antimony, arsenic, mercury and thallium which are still in today's rule. The other four metals have been deleted. See comment number 57). (See 1980 Guidelines, pp. 79348-49.) EPA has suggested that States may select more appropriate fish species such as non-migratory and recreational species in developing BCF values which would more appropriately reflect local conditions and aquatic species (see response to comment earlier regarding BCFs and the Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001; March, 1991 at pp. 36-41.) Some States have chosen to do so.

78. *Comment:* A commenter stated that EPA utilized a high degree of overprotection in developing criteria for antimony. The commenter requested EPA to update the IRIS and Health Effects Assessment Summary Tables by using available data to provide toxicity information for various antimony compounds that more appropriately reflects such factors as differences in gastrointestinal absorption rates.

Response: In developing a criteria for antimony the Agency relied upon the available data which is very limited for antimony compounds. The greatest volume of information in terms of chronic exposures to antimony salts was for potassium antimony tartrate. This compound is also the most toxic antimony compound tested. In order to be protective of antimony in all its possible forms, organic and inorganic, the Agency relied upon data from potassium antimony tartrate. Therefore, the IRIS-listed reference dose (RfD) for antimony tartrate is used in the criteria development.

It is true that this criterion may be conservative in some cases. EPA is promulgating this antimony criterion because the criteria must protect human health and it has not been established which antimony compounds may be produced under natural conditions in ambient waters.

79. *Comment:* A commenter stated that EPA should establish separate criteria for the less soluble and commercially more important antimony oxides. The IRIS database indicates a much higher NOAEL for antimony trioxide than for antimony tartrate.

Response: As stated above, the Agency is setting criteria which would result in protection from all soluble forms of antimony, not just the most common forms. It is true that antimony oxide is much less toxic than potassium antimony tartrate. However, the Agency is taking a conservative approach and assuming that there is the potential for toxic organic antimony compounds, such as the tartrate compound, to form under ambient water conditions. For this reason, the Agency chose the more stringent of the two RfDs listed on IRIS for antimony compounds. (See 1980 Guidelines discussion, p. 79355.)

80. *Comment:* A commenter stated that EPA should use a less conservative application of uncertainty factors in developing the RfD for antimony.

Response: The RfD for antimony, based on the lifetime rat study by Schroeder et al. cited in IRIS (1992), includes an uncertainty factor of 1000 since the study resulted in a Lowest Observed Adverse Effect Level (LOAEL). A No Observed Adverse Effect Level (NOAEL) could not be determined from this study. It is Agency policy to assign an uncertainty factor of 1000 to a LOAEL from an animal study of lifetime duration. If there had been a higher degree of certainty that this LOAEL was indeed close to an observed NOAEL, then the uncertainty factor assigned may have been reduced. However, given the paucity of data on antimony, the Agency assigned the full 1000 uncertainty factor in developing an RfD. (See discussion in the 1980 Guidelines, pp. 79353-54.)

81. *Comment:* A commenter stated that EPA should use the revised bioconcentration factor (BCF) of 0.5 recently developed by EPA for antimony instead of the outdated BCF (1.0) used in calculating the criteria.

Response: It is not true that the BCF for antimony has been officially revised since the 1980 ambient water quality criteria (AWQC) was developed. There are draft updated BCFs under development by the Agency. However, the Agency has not provided the public an opportunity for comment on the new BCF as it has for the revised RfD values which were derived from IRIS. Information on IRIS is considered public information, easily accessed and open to public review. The Agency decided it would be unfair to include revised BCF values into this rulemaking without giving all interested parties a chance to comment on them. For this reason the Agency has presented criteria with 1980 BCF values. EPA will revise the criteria for human health once a revised methodology is developed. At that time we will also include all updated BCF values.

82. *Comment:* Several commenters stated that the polychlorinated biphenyls (PCBs) criteria needed revisions. These included: (1) Revising the cancer potency factor estimated by EPA, (2) setting criteria for each of the Aroclor mixtures separately rather than for a single Aroclor mixture, (3) translating the animal evidence of carcinogenicity into human risk values.

In support of their argument concerning the cancer potency of PCBs, the commenters cited from the report, "Reassessment of Liver Findings in PCB Studies in Rats by Pathology Working Group" prepared by the Institute for Evaluating Health Risk (IEHR). The report reviewed five chronic studies in rats using Aroclor 1260, Aroclor 1254, Clophen A-60 and Clophen A-30. PCBs with chlorine content of less than 60% i.e., Aroclor 1254 and Clophen A-30 had little or no evidence of carcinogenicity. With respect to Aroclor 1260 study, the commenter recommended that the EPA should use a cancer potency factor of either 5.1 or 1.8 (mg/kg/day)⁻¹. The EPA potency factor of Aroclor 1260 is 7.7 (mg/kg/day)⁻¹. The cancer potency factor of 5.1 (mg/kg/day)⁻¹ was calculated from the same study (Norback and Wellman) as used by the EPA. Use of geometric means of all the studies with chlorine content of 60% resulted in the cancer potency factor of 1.9 (mg/kg/day)⁻¹.

The commenter argues since there is no evidence that the PCBs with chlorine content of less than 60%, are carcinogenic, the Agency should set a separate criterion for each of the mixtures i.e., Aroclor 1242, Aroclor 1254, etc.

Response: EPA disagrees with the commenter concerning the cancer potency calculations using geometric means of several studies resulting in value of 1.9 (mg/kg/day)⁻¹. Utilization of a geometric means approach for the calculation of potency estimates from the available studies is not reasonable because different animal strains and age levels were used in these studies. In addition, the study of Norback and Wellman, cited in IRIS (1992), from which EPA calculated its potency factor of 7.7 (mg/kg/day)⁻¹, was much superior in its design and conduct than the other studies. Therefore, the Norback and Wellman study is expected to provide a more precise criterion. The re-examination of slides from the Norback and Wellman study by a group of private pathologists and the use of the revised data is alleged to a yield cancer potency factor of 5.1 (mg/kg/day)⁻¹. This potency factor is not very different from that calculated by the Agency.

The Agency believes that it is not reasonable to develop a criterion for each of the PCB Aroclor mixtures. PCBs are mixtures of chlorinated biphenyls. Each mixture may contain up to 209 possible individual compounds. These mixtures are prepared by treating biphenyls and chlorine under alkaline conditions and are characterized by the chlorine contents of the mixtures. For example Aroclor 1242, 1254 and 1260 contain 42, 54 and 60 percent chlorine contents respectively. These mixtures are not characterized by the occurrence of each possible compound in the mixture. Each of the mixtures would be expected to contain all combinations of chlorinated compounds even though some of them in small or trace amounts. In summation, all the Aroclors are expected to contain chlorinated carcinogenic PCB isomers. Besides expecting carcinogenic compounds in each mixture, these mixtures cannot adequately be analyzed with commonly available methods.

The Agency believes that the evidence of carcinogenicity observed in animals can be used to estimate risk values. The Agency has used this approach in this regulation based on the existing Agency 1980 Guidelines (51 FR 33992).

83. *Comment:* One commenter noted that there is a marked range of carcinogenic potencies between the various nitrosamines with some nitrosamines exhibiting no carcinogenic activity. The commenter argued that reliance on structural similarity methodology could therefore result in misclassification errors as to whether specific compounds should be treated as carcinogens.

Response: EPA agrees that there is a marked range of carcinogenic potencies between the various nitrosamines with some nitrosamines exhibiting no carcinogenic activity. If there are adequate data available for a specific nitrosamine, EPA uses such data in evaluating the health risks that such a chemical may present. However, such data are often not available. As a consequence, EPA must, as a practical matter, infer the toxicity of one compound from the toxicity of a chemically similar analogue.

84. *Comment:* A commenter submitted a document entitled, "Biological Risk Assessment of N-Nitrosodimethylamine." While this document does not recommend a specific human health criteria for N-nitrosodimethylamine (NDMA), it does conclude that: 0.0044 µg NDMA/kg/day will present the public with a lifetime 10⁻⁵ risk level of cancer.

Response: It is not at all clear how the author(s) of "Biological Risk Assessment

of N-Nitrosodimethylamine" arrived at the 0.0044 µg NDMA/kg/day with 10⁻⁵ risk level. Assuming the ingestion of 2 L of water/day by a 70 kg adult, 0.0044 µg NDMA/kg/day is equivalent to a level of NDMA in drinking water of 0.28 µg NDMA/L. Based on the same data, IRIS concluded that the 10⁻⁵ risk level for NDMA in drinking water is 0.007 µg/L (i.e., 1/40 the value of "Biological Risk Assessment of N-Nitrosodimethylamine"). Thus, EPA disagrees with the comment since inadequate data and analysis were provided.

85. *Comment:* A commenter noted that the human health criteria presented in the table (in parentheses) are for pollutants which had no health based criteria in the 1980 criteria documents (45 FR 79318). The commenter urged EPA to not include these criteria in the final rulemaking.

Response: The proposed rule indicated these values presented with parentheses in the matrix were not being proposed as regulatory criteria but were presented as notice for inclusion in future State triennial reviews. So as not to confuse these values with the criteria being promulgated today, those values were deleted from the matrix and presented below.

Compound	Water and organisms (µg/L)	Organisms only (µg/L)
Copper	1300
1,2-Dichloropropane	0.52	39
1,2-Trans-Dichloroethylene .	700
2-Chlorophenol	120	400
2,4-Dimethylphenol	540	2300
Acenaphthene	1200	2700
Butyl Benzene Phthalate	3000	5200
2-Chloronaphthalene	1700	4300
n-Nitrosodi-n-Propylamide ..	0.005	1.4

3. Economics

86. *Comment:* Many commenters objected to the Agency's decisions not to develop detailed cost estimates and not to conduct a comprehensive Regulatory Impact Analysis. The objections were presented in terms of (a) EPA's obligation pursuant to Executive Order 12291 to conduct an analysis; (b) the need to use benefit-cost analysis to make effective public policy decisions, and (c) EPA's error in relying on the difficulty of the task as a reason for not conducting the analysis.

Response: EPA's decision not to provide detailed cost estimates was based on the unusually complex characteristics of this rule with respect to projecting the burden on dischargers. Section J of this preamble includes a discussion of EPA's effort to estimate costs for the rule. As a very brief summary, cost estimates for compliance

with water quality-based permits would be based on numerous assumptions; results are sensitive to these assumptions; and consequently, the results would not provide meaningful information to the rulemaking process.

For the final rule, the Agency has undertaken a cost assessment to express a range of compliance costs for several combinations of industries and pollutants. The Agency has also estimated and/or described a range of health and ecological benefits for the rule. While this information about costs and benefits does not constitute a comprehensive Regulatory Impact Analysis, the assessment provides descriptive information about the types of costs that might be incurred as new water quality standards are translated into specific NPDES permits. Also, the ranges illustrate the uncertainties inherent in any estimate of costs.

In addition to the compliance costs to dischargers, other types of cost impacts may occur as a result of EPA-imposed numeric criteria in State water quality standards. For example, nonpoint sources of pollution may incur costs to the extent that best management practices need to be modified to meet water quality standards. In addition, States may incur increased monitoring costs, but only if there is some reasonable expectation that the pollutants are manufactured or actually used in the State.

Several commenters, representing the interests of industrial and municipal dischargers, provided cost estimates; others provided cost data for various compliance strategies. These cost estimates cannot form the basis of an economic impact analysis. Insufficient information is presented in the comments to determine whether these costs reflect the most cost-effective means of achieving the required pollutant reductions. Similarly, EPA cannot confirm whether the cost estimates reflect the incremental cost to comply with water quality-based standards beyond the cost to comply with technology-based regulations. It is the incremental costs that are relevant to this assessment. In addition, the information supplied in the comments is not sufficient to measure the impact of these costs on the financial condition of the dischargers (whether industrial or households).

Due to the uncertainties, a Regulatory Impact Analysis would not alter the Agency's decision to fulfill its statutory responsibilities and promulgate numeric criteria for toxic pollutants. The same conclusion applies to detailed compliance cost estimates.

U.S. Government Standard Form 83, Request for OMB Review, includes a section for OMB to waive the requirements to conduct a Regulatory Impact Analysis, so OMB does have such authority.

87. *Comment:* Several commenters asserted that EPA has not demonstrated that the costs and operating inefficiencies of complying with federal criteria are commensurate with environmental benefits.

Response: The provisions in the Clean Water Act covering water quality standards and specifically, establishing numeric water quality criteria for toxic pollutants, do not include consideration of costs or benefit-cost comparisons. As explained above in section J, economic factors are considered at some points in the process (such as establishing water body use classifications), but not as a component of adopting water quality criteria. The statutory requirements covering water quality criteria focus instead of protection of human health and the environment.

EPA has considered the ability and value of estimating the benefits associated with revised water quality criteria. A summary of the human health and ecological benefits is included in Section J of this preamble.

Briefly, the Agency finds that reduced pollutant discharges are feasible at reasonable costs for several examples. In addition, the national toxics rule has the potential to reduce excess cancer cases. Other ecological benefits, such as protection of wildlife and aquatic organisms, are also projected as an outcome of States adopting numeric pollutant criteria in their water quality standards.

88. *Comment:* Several commenters argued that EPA should conduct a Regulatory Flexibility Analysis because not to do so is a violation of the Regulatory Flexibility Act, and an agency cannot abrogate its statutory duty by pleading hardship.

Response: EPA finds that meaningful results from extensive cost and regulatory impact analyses for this rule are unlikely to be achieved. The same conclusion applies to a detailed analysis conducted in response to the Regulatory Flexibility Act. Briefly, the numerous assumptions and analytical difficulties that are inherent to this rulemaking yield information about the scope of costs, but not detailed cost estimates for specific groups of discharges, such as small entities. Nonetheless, as described above, EPA's evaluation does not find that there will be a significant impact on a substantial number of small entities; therefore, a final Regulatory Flexibility Analysis is not required.

89. *Comment:* Several commenters asserted that EPA should consider current economic conditions in determining whether to promulgate Federal criteria.

Response: While EPA acknowledges that prevailing economic conditions affect individual business decisions concerning investment in pollution control, Congress clearly intended the Agency to move expeditiously when Federal action is warranted. In compliance with congressional intent, EPA is promulgating these criteria at this time.

In addition, it is not clear which "current economic conditions" should be taken into account in establishing federal criteria. The limitation of toxic discharges is intended to be a continuing process, with this rule a part of the on-going control process. Since the criteria will be in effect during all phases of business cycles, current conditions cannot be the sole determinant of economic conditions when analyzing the economic impact of a regulation. Likewise, the impact of this rule will not be incurred immediately because the criteria will be written into new discharge permits as the current permits expire.

90. *Comment:* Several commenters, representing industrial and municipal dischargers, asserted that the economic impacts of complying with EPA-imposed criteria will be substantial and will be burdensome.

Response: While it is likely that some dischargers will incur compliance costs when the EPA-imposed numeric toxic pollutant criteria are translated into specific NPDES permits, it is not certain that such costs or their impacts will be unreasonable. For several industries, as described in the Agency's cost assessment, large segments of the discharging community will not be affected by this rule because, for example, costs to comply are very small, or technology-based limitations are a sufficient basis for effluent control that will also control pollutants to the level needed to comply with in-stream water quality criteria.

91. *Comment:* Commenters representing municipal interests stated that EPA is incorrect in the assumption that industrial sources are the primary source of toxics discharges by POTWs.

Response: EPA recognizes that there are several sources of toxic pollutant contributions to POTWs. Industrial indirect dischargers, while not the only source, are often the primary source, and the toxic influent from these sources can often be controlled through pretreatment programs.

92. *Comment:* Several commenters stated that promulgation of Federal criteria removes the flexibility to reduce impacts that States would have had by adopting their own standards. Further, they argue, EPA is incorrect in its assumption that impacts are no different than what would occur if States had acted to adopt their own standards.

Response: States continue to have the opportunity to adopt their own standards that include numeric criteria for toxic pollutants. As they adopt and EPA approves their water quality standards, the flexibility provided in the standards-implementation and permit-writing phases of the standards process will return to the States. For a discussion of the effect of this promulgation on various implementation questions, including flexibility, see subsection 4 of this section.

In the cost assessment, EPA has investigated the potential incremental effects of EPA setting standards instead of States. Briefly, EPA finds that for certain dischargers, incremental costs may be incurred in States where toxic pollutant criteria are adopted at EPA's levels. If a State were to adopt less stringent criteria, it is possible that the impacts would be reduced. It is important to consider that in some of the examples, EPA's criteria did not result in incremental costs.

As discussed elsewhere in this preamble, EPA encourages States to adopt their own standards and make use of site-specific criteria as appropriate.

4. Implementation

93. *Comment:* The Agency received substantial comment on 40 CFR 131.36(c) which described the proposed implementation procedures for priority toxic pollutant criteria. Comments divided on whether such factors should be included or left to the discretion of the States.

Response: For reasons stated in the preamble to the proposed rule (56 FR 58437, section 3, Applicability), EPA believes that baseline application conditions must be included in order to provide the intended environmental and human health protection of the criteria. These criteria consist of more than quantitative concentrations. EPA's section 304(a) criteria methodology clearly presents the criteria as criteria maximum concentrations (CMC) and criteria continuous concentrations (CCC) which contain averaging periods and return frequencies. The implementing hydrological conditions merely provide minimum conditions to meet these definitions. The salinity conditions delineating when and where

the freshwater and saltwater criteria apply are also necessary. EPA must specify where each of these sets of criteria apply. Likewise the hardness limitations for applying the metals criteria. Each of these paragraphs will be discussed in more detail below but are mentioned here to demonstrate their necessity for implementation of the criteria. Without these generic application conditions NPDES permit writers, the principal users of the criteria, would be unable to develop conditions and limits for inclusion in NPDES permits within the requisite ranges of consistency and predictability.

94. *Comment:* The ability of States to develop site-specific criteria and to grant variances and exceptions to standards received several comments generally indicating that EPA should not constrain the ability of States to use such implementation procedures.

Response: The development of site-specific criteria and the use of variances to standards are optional procedures made available to States that adopt State criteria (40 CFR 131.11(b)(ii) and 131.13). It is neither a statutory nor a regulatory requirement to develop site-specific criteria or to issue variances.

The preamble language to this final rule clarifies EPA's statement on this subject in the proposal. Since the criteria in this rule are Federal criteria applicable to the State, a State cannot unilaterally establish site-specific criteria or grant variances to the Federal rule. That is what EPA meant in the proposal when we indicated that actions pursuant to State law for Federally promulgated criteria are precluded. Such procedures are still available to the State, but are much more cumbersome as it requires the State to meet all the regulatory requirements for developing such procedures, but then EPA would need to undertake a Federal rulemaking process in order to effectuate changes to the Federal rule in accordance with the requirements of the Administrative Procedures Act. EPA continues to emphasize that this is another strong reason for States to act to adopt their own standards even after Federal promulgation action is taken.

95. *Comment:* One EPA Region questioned whether the specification of the applicable hydrological baseline mandated the use of steady state models and eliminated the use of dynamic models for wasteload allocations.

Response: The proposed rule did not intend to eliminate the use of dynamic models for wasteload allocations and total maximum daily load determinations. Generally the low flows specified explicitly contain duration and frequency of occurrence which

represent certain probabilities of occurrence. Likewise the criteria for the priority toxic pollutants are defined with duration and frequency components. Dynamic modeling techniques explicitly predict the effects of variability in receiving water, effluent flow, and pollutant concentration. EPA has recommended and described three dynamic modeling techniques for performing waste load allocations in section 4.5 of the 1991 Technical Support Document: Continuous simulation, Monte Carlo simulation and lognormal probability modeling. These procedures allow for calculating wasteload allocations that meet the criteria for priority toxic pollutants without using a single, worst-case concentration based on a critical condition.

Thus, EPA believes that either dynamic modeling or steady State modeling can be used to implement the criteria adopted today.

96. *Comment:* Several commenters in addressing implementation conditions argued that EPA should defer entirely to State discretion including the applicable design flows. Other commenters urged removal of design flows from the rule and rely on the guidance in the TSD and/or other EPA guidance. Another commenter agreed that flow requirements were necessary but that the harmonic mean flow requirement was flawed.

Response. As noted in the preamble to the proposed rule, implementation requirements that include limitations on flow values are required in order to achieve the intended environmental and human health protection. The applicable discussion of this issue is found in the preamble to the proposed rule on pages 58437-58438 and footnotes 1 and 2. The hydrological or biological basis for the proposed low flows were taken directly from EPA's Technical Support Document for Water-Quality-based Toxics Control. (See TSD, Appendix D for aquatic life and section 4.6 for human health.)

The argument by the commenter on the harmonic mean flow was in reality a disagreement on EPA's assumed long-term dose assumption for toxics. The commenter believes short-term effects are more relevant, and therefore requires a different flow, especially for bioaccumulative pollutants. However, EPA continues to support the human health protocol used in the proposed rulemaking and notes that it explicitly accounts for bioaccumulation in the criteria development protocols. For such long-term human assumed consumption of water and aquatic life from such waters containing a pollutant, EPA's

best scientific judgment is that the harmonic mean flow is the correct flow to apply in order to correctly estimate the exposure dosage of the average exposed individual.

97. *Comment:* One commenter questioned the applicability of the specified design flows in waters downstream from impoundments which have minimum release rates specified, as for example hydroelectric dams.

Response: EPA's proposed rule in § 131.36(c)(2)(ii) specifies that the low flows are applicable to "waters suitable for the establishment of low flow return frequencies." Thus, free flowing streams and rivers were the types of receiving waters contemplated. In cases where legally specified low flows exist, as for example under FERC licenses, these become the applicable minimum flows. In future State water quality standards reviews, EPA encourages the States to take into account these specified flows and adjust the criteria appropriately to provide equivalent protection of human health and the environment to that applied in today's rule.

98. *Comment:* One commenter noted that "rules" 5(a) and (b) are inconsistent with "rule" 8 in the "Assumptions and Rules Followed by EPA in Writing the proposed § 131.36(d) Requirements for All Jurisdictions." (See the appendix at page 58451 in the proposed rulemaking package.)

Response: "Rules 5(a), 5(b) and rule 8" as stated in the appendix are correct. An incorrect statement of "rule 8" is contained in the preamble to the proposed rule at page 58432. Briefly stated, these rules provide:

- Rule 5(a) applies appropriate human health criteria to all waters in a State classified for either public water supply or for minimal aquatic life protection;
- Rule 5(b) provides that where a State has determined the specific segments where aquatic life are caught and consumed, the human health fish consumption only criteria (Column D2) are being applied to those specific segments;
- Rule 8 provides that where drinking water uses are designated, and even though the State has determined that no potential fish consumption uses exist, the human health criteria for "water + fish" in column D1 are applied. EPA applies these criteria because no "water only" column is available in the section 304(a) criteria methodology and drinking water uses must be protected.

99. *Comment:* Several commenters claimed that EPA was applying the criteria too broadly; that is, to waters

where aquatic life propagation or public water supply uses were either not designated or did not constitute existing uses. In contrast, another commenter urged EPA to apply the criteria to all waters of the State where an EPA-approved use attainability analysis did not exist.

Response: Water quality standards contain both a designated use and the criteria necessary to support those designated uses. In this rulemaking EPA is not addressing the designated use component at all, but only the criteria component for the priority toxic pollutants. EPA has relied entirely on the existing State water quality standards to determine the waters to which the criteria apply. In § 131.36(d) EPA refers to all waters within particular designated use classifications.

Because EPA is not addressing the State designated uses here, EPA has not attempted to review State application of designated use classification through use attainability analyses or the other requirements of 40 CFR 131.10. Any identified deficiencies will be handled during the State triennial water quality standard review process with any necessary Federal actions being taken on a State by State basis.

100. *Comment:* One commenter objected to EPA specifying that EPA-approved State mixing zone regulations could be applied to the priority toxic pollutant criteria promulgated today. Others stated that EPA should include procedures to define appropriate mixing zones, that EPA should allow mixing zones in all States and that EPA should require mixing zones in all States.

Response: Mixing zones are one of the general discretionary policies specifically authorized for State adoption by EPA's water quality standards regulation at 40 CFR 131.13. Mixing zones have most recently been defined by EPA in the revised TSD (see page "xx") as "an area where an effluent discharge undergoes initial dilution and is extended to cover the secondary mixing in the ambient waterbody. A mixing zone is an allocated impact zone where water quality criteria can be exceeded as long as acutely toxic conditions are prevented." Although mixing zones are discretionary for the States, they are part of the State's water quality standards and therefore subject to EPA review and approval pursuant to CWA section 303(c) and 40 CFR 131.

Mixing zones recognize ambient water dilution and therefore larger mixing zones generally would reduce the stringency of discharge permit limits established to meet ambient water quality criteria. It would be inconsistent with CWA section 501 (33 U.S.C. 1370)

for EPA to impose a less stringent mixing zone policy in a State than is currently authorized. Therefore, in this rulemaking EPA recognizes State mixing zones and provides for their application in implementing the criteria promulgated by this rule. However it does not impose mixing zone requirements on States which do not have such policies.

101. *Comment:* Comments were received that the Federal toxics criteria are not viable because they have never been subject to public comment and review and that the criteria should be subject to continuing peer review and study in order to ensure technical viability. Commenters stated that it is improper to require development of permit limitations on the basis of technically flawed criteria which may not be relaxed in the future due to the anti-backsliding requirements of the CWA and regulations, and that EPA must find that criteria changes which result from peer reviews constitute new information which qualify as an exemption from the anti-backsliding requirements.

Response: We disagree with the premise of this comment that provision for public review and comment on the federal toxics criteria has been inadequate. The criteria methodology and documents were the subject of public review when issued. See the discussion of this issue in the preamble to the proposed rule as well as discussion of EPA's plans to revise criteria guidelines in the future and solicit public comment, 56 FR at 58433. (See also Section F of this preamble.) To the extent we received specific information concerning the criteria in this rulemaking, we have reviewed and responded to that information. Indeed, certain of the promulgated criteria have been changed to reflect public comments. EPA rejects the assertion that the criteria are "technically flawed." EPA believes the criteria are scientifically defensible and would not promulgate criteria that were technically flawed regardless of the anti-backsliding implications. With respect to the comment that revised criteria resulting from peer reviews should constitute "new information" which is exempt from the anti-backsliding requirements, that is not an issue to be decided in this rulemaking. EPA is developing proposed amendments to the NPDES regulations that will interpret and implement the provisions of section 402(e). The commenter's concerns can be addressed in that rulemaking or possibly in a prior permit proceeding if the issue is relevant.

102. *Comment:* One commenter argued that the rule will adversely affect implementation of the NPDES program by diverting resources to deal with permitting and enforcement issues arising from the use of unscientific water quality criteria. It is argued further that no discharger will accept permit conditions that are unreasonable, have no scientific basis, and do not reflect the naturally occurring environmental conditions in the receiving water.

Response: Federally promulgated water quality criteria will be implemented in NPDES permits issued by EPA Regional Offices or authorized States. Dischargers are free to challenge requirements implementing federally promulgated criteria contained in modified, reopened, or reissued permits according to established NPDES permit appeal procedures and as permitted by law. EPA, however, disagrees that the federally promulgated criteria lack a scientific basis and has explained in the preamble to this rule and elsewhere in response to comments why promulgation of the criteria as provided in this rule is necessary to meet the requirements of section 303(c)(2)(B). We anticipate that many dischargers will accept permit requirements based upon the federally promulgated criteria. Dischargers may be permitted to backslide from water-quality based permit limitations where revised criteria are developed if they meet the requirements of CWA sections 402(o) or 303(d)(4) for allowing backsliding in attained and non-attained waters.

103. *Comment:* Comments were received that either the proposed Federal or State standards should provide for a schedule of compliance so that permittees affected by the new federal criteria could have sufficient time to come into compliance.

Response: The proposed rule did not directly provide for a schedule of compliance, however, it also did not change existing applicable State and EPA provisions related to permit issuance or reissuance. EPA agrees with the commenters that some compliance implementation time may, in certain situations, be necessary and appropriate for permittees to meet new permit limits based on the new standards. EPA has not removed this flexibility in the permitting process by this rulemaking. Under the Administrator's April 16, 1990 decision in an NPDES appeal (Star-Kist Caribe Inc., NPDES Appeal No. 88-5), the Administrator stated that the only basis in which a permittee may delay compliance after July 1, 1977 (for a post July 1977 standard), is pursuant to a schedule of compliance established

in the permit which is authorized by the State in the water quality standard itself or in other State implementing regulations. (This decision did not affect compliance schedules in individual control strategies issued under section 304(e) of the CWA.)

Standards are made applicable to individual dischargers through NPDES permits which reflect the applicable Federal or State water quality standards. When a permit is issued, a schedule of compliance for water quality-based limitations may be included, as necessary, and EPA assumes this is the case for permits issued to meet these new Federal criteria where States do not have existing statutes, regulations or policy prohibiting compliance schedules. EPA notes that some permits contain a "reopener" clause which may be exercised by the permitting agency on a case-by-case basis to control toxics earlier than the normal re-issuance cycle. However, EPA does not generally contemplate nor does it intend to ask States to undertake permit reissuance related to these new criteria for toxics through anything other than the normal permit reissuance cycle, except in rare instances.

104. *Comment:* EPA's section 304(a) criteria may not be appropriate when applied to non-conventional discharge situations such as stormwater discharges and discharge to ephemeral streams.

Response: EPA's criteria for priority toxic pollutants were developed to protect beneficial designated uses. The criteria are independent of considerations about kinds of dischargers whether point or nonpoint sources. If a State finds that the criteria for the current ambient water designated uses are inappropriate, then EPA's water quality standards regulations provide for a use attainability analysis and establishment of appropriate designated uses. Thus the commenter's concerns are misplaced and focus on the wrong part of the water quality standard.

105. *Comment:* Two comments addressed the salinity and effects on determining which criteria apply at particular locations in estuaries. One commenter, a State agency, supported the concept of clarifying the salinity ranges within which the various freshwater and marine water criteria apply. The State was concerned because the salinity ranges selected by EPA were different from those the State had recently placed in sediment standards. The second commenter asserted that the proposed rule created an untenable situation where fresh and salt waters mix. This commenter suggested that rather than using the more stringent of

the fresh or saltwater criteria, EPA should interpolate between the two on the basis of salinity.

Response: The range of salinities incorporated into this rule at 40 CFR 131.36(c)(3) are appropriate, especially in light of the guidance for the applications of the metals criteria addressed elsewhere in this package.

EPA's proposed rulemaking on salinity, however, was silent on the percentage of the time that the proposed salinity limits could be exceeded but the respective fresh or saltwater criteria still apply. It could be inferred that EPA intended 100% of the time as the appropriate limit. It is EPA's position that a reasonable exceedence should be specified or otherwise the intermediate brackish water zone becomes unnecessarily large. It is EPA's judgment that a factor of 95% of the time provides reasonable cut off points. Thus, for the freshwater criteria to apply, the salinity should be less than 1 ppt 95% of the time. Likewise for the marine water criteria to apply the salinity should be greater than 10 ppt 95% of the time.

EPA recognizes that judgment is required in providing guidance on the appropriateness of freshwater and saltwater water quality criteria across a salinity gradient. This is because a fundamental understanding is lacking of metals form, bioavailability and toxicity along with the relative sensitivities at appropriate salinities of species that occupy this gradient. EPA's recommendations are reasonable given that (1) the database for most metals includes tests with saltwater and freshwater species that tolerate these salinities; (2) that salinities at a particular location change daily with tide and wind and seasonally; and (3) that at low salinities, freshwater and saltwater species mix. It is reasonable that the presence of both types of species in this transition zone require application of both freshwater and saltwater water quality criteria. Given the temporal variability of salinity in both the short and long term and the judgmental basis for EPA's recommendations, knowledge of the kinds of organisms at a site of concern will be particularly helpful in being confident that the appropriate criterion has been applied to the site.

The second commenter's suggestion is not supported by data or professional experience of EPA's scientists. For many metals, toxicity to saltwater species increases at low salinities. Therefore, underprotection would result from the use of an interpolation approach that would result in higher criteria at low or intermediate salinities.

5. Timing and Process

106. *Comment:* EPA should delay Federal promulgation until current State efforts to adopt water quality standards have been completed.

Response: Without sufficiently protective and defensible water quality standards, EPA and the States cannot effectively control discharges of toxic pollutants. While the Clean Water Act clearly gives primary authority for adopting water quality standards to the States, Congress clearly signaled its frustration with State delays in adopting criteria for toxics in the 1987 Clean Water Act amendments. Since the 1987 amendments, the States have had over five years to meet the statute's requirements for adopting water quality standards for toxic pollutants. Further delay is unacceptable. It is now time for EPA to exercise its oversight authority to ensure that human health and the environment are adequately protected.

107. *Comment:* Several comments were received relating to the general subject of State action during or subsequent to this rulemaking and on the processes EPA would use to withdraw Federal criteria applicable to a State. A related comment was that EPA should clarify that partial withdrawals are possible. Another comment questioned which criteria would apply in a situation where EPA approves State standards subsequent to the Federal promulgation.

Response: EPA is fully aware that several States are actively involved in reviewing and possibly revising their standards to meet the requirements of the Act simultaneously with the Agency's action to promulgate Federal standards. It is an objective of the Federal action to spur State action to complete their own administrative procedures so as to obviate the need for Federal promulgation. However, for the reasons stated earlier in the preamble as the basis for this rulemaking, EPA believes States have already had more than adequate time to respond to the statutory requirement and that EPA has a responsibility to act to put standards in place to serve as a basis for environmental control programs. Nevertheless, EPA encourages States to continue to adopt their own standards and thereby enabling themselves to make use of the flexibility inherent in the program through use of the various implementation processes even if such action will not be completed until after promulgation of this rule. EPA is committed to timely withdrawal of the Federal standards after State adoption and EPA approval of State standards.

The assertion that upon adoption of standards by the State, EPA's Federal criteria are no longer applicable within the State is not correct. The Federal criteria will continue to be the applicable water quality standards until withdrawn. Where the State standards are less stringent than the Federal standards, the Federal standards will be controlling until final action is taken to withdraw the Federal standards. In this situation, the permitting agency must use the more stringent standards in issuing permits. As a practical matter, it is assumed that permit holders would seek a stay of permit requirements pending the final decision of the Federal standards. While there may be a period in which there are both State and Federal standards in effect, the most stringent standards (either the State's or EPA's) would be controlling.

As described earlier in the preamble, EPA will act to withdraw this rule as applicable to a State, if the State completes action on adopting standards that adequately protect their waterbodies from toxic contamination and EPA approves those standards. The standards do not necessarily have to be exactly as those promulgated by EPA but they must meet the requirements of the Act and 40 CFR 131.11.

Many comments were received that EPA should not be required to receive comment and execute a rulemaking in order to withdraw State-adopted and EPA-approved standards that are less stringent than those promulgated by EPA. As described in Section E-3 of this preamble, EPA withdrawal action differs depending upon whether the State standards are equal to or more or less stringent than those promulgated in this rule.

While it would be administratively less cumbersome not to provide notice and comment in withdrawing a more stringent Federal water quality standard, EPA, however, is constrained by the provisions of the Administrative Procedures Act, 5 U.S.C. Section 551 (4) and (5) which we believe preclude the Agency from withdrawing a rule as suggested by the commenters. EPA will take timely action to withdraw the Federal rule in these cases. EPA has had experience in withdrawing the Federal rule covering each situation, i.e. standards equal to or more or less stringent than the Federal rule (51 FR 11581, April 4, 1986; 47 FR 53372, November 26, 1982; 56 FR 13592, April 3, 1991). It has not proven to be a practical problem. Consistent with the water quality standards guidance and historical operating policies, EPA confirms that partial approval of State standards and partial withdrawal of the

Federal rule is allowable. (See generally, Chapter 2, Water Quality Standards Handbook, December 1983)

There is an exception to this process. If a State adopts a 10^{-5} risk level when EPA promulgated 10^{-6} , the rule can be withdrawn without notice and comment because we raised the possibility of different risk levels in the proposal and we have accepted both risk levels as meeting the requirements of the Act.

108. *Comment:* EPA received comment that there is no procedural necessity for this rule because Congress did not set a specific deadline for State action to comply with section 303(c)(2)(B).

Response: For the reasons set forth elsewhere in this preamble, EPA has the requisite statutory authority to promulgate these criteria and that such criteria are necessary as a basis for water quality-based control programs designed to protect the public health and the environment.

Section 303(c)(2)(B) of the Act requires States action to address toxic pollutants "whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection * * *". Paragraph (1) refers to the requirements to review and revise, if necessary, standards at least once each three year period—the triennial review cycle for standards.

Notwithstanding arguments concerning timeliness of EPA and State actions, the Agency has made a decision that toxics criteria for priority toxic pollutants should be in place. The Administrator's action has started the process described in CWA section 303(c)(4) for Federal promulgation. Thus, because of the Agency's action, the comment at this point is moot.

109. *Comment:* EPA received numerous comments concerning the 30-day public comment period. Some industries and municipalities expressed concern that the rulemaking was too extensive to allow meaningful comment within 30 days. Some commenters requested extensions up to six additional months. Several commenters noted that EPA had never before promulgated a final water quality standards rule within 90 days of proposal.

Response: EPA appreciates that 30 days is a short comment period but believes that it is fully consistent with section 303(c)(4) (33 U.S.C. 1313(c)(4)) which requires EPA to promulgate a final regulation within 90 days of proposal. The fact that EPA only met this requirement once in its nine final promulgation actions does not change the statutory requirement.

In most of those previous cases (and in 2 cases today) the Agency was in fact superseding a State rule. Pursuant to the Agency's regulation at 40 CFR 131.21(c) the State rule stayed in effect until EPA's final rule took effect. Today's action is different. Here, by and large, there are no State criteria for priority toxic pollutant in place and EPA is acting to fill that void. This EPA action has a greater sense of urgency and justifies the Agency's effort to meet the 90 day statutory time schedule in CWA section 303(c)(4).

The addition of section 303(c)(2)(B) to the Clean Water Act was a clear and unequivocal signal from Congress that it was dissatisfied with the slow pace at which States were adopting numeric criteria for toxic pollutants. This intent is made clear in the legislative history of that provision. It is the only time in the 26-year history of the program that Congress explicitly directed the States to address certain pollutants in their standards. Moreover, section 303(c)(4), which authorizes Federal promulgation has explicit deadlines and Congressional directives to act promptly. The intent of the Federal promulgation section of the Act is to accelerate human health and ecological protection by establishing water quality standards as a basis for pollution control programs. To achieve these objectives and meet the statutory deadline, we need sufficient time to review public comments and make any necessary revisions.

Although the State and pollutant coverage of this final rule is large, the issues involved are neither new nor numerous. The primary focus of this rule is the narrow issue of whether a State has adopted sufficient water quality criteria for toxic pollutants in State standards as necessary to support water quality-based control programs.

EPA alerted the public to its intentions and the planned contents of the proposal on April 19, 1990, in an announcement in the *Federal Register*. In addition, we notified the administrators of the State agencies responsible for the water quality standards program of each potentially affected State of our plans on April 9, 1990. In the April 19, 1990, notice, EPA described what would be in the proposal, including: Which pollutants, which States, the cancer risk level, and EPA's intention to update criteria using publicly available information in the Integrated Risk Information System. Since that notice, EPA has apprised the public of its intentions and status of its action through State and Regional meetings and quarterly newsletters on the criteria and standards program. EPA,

through both its Headquarters and Regional Offices have met with the States, and the regulated community individual and public meetings and public hearings to discuss EPA's plans and progress. This lengthy lead time has allowed potential commenters to prepare for the proposal and should have facilitated preparation and submission of meaningful comments within the 30-day public comment period.

As discussed previously in this preamble and the preamble to the proposed rule, the methodology used to develop the criteria and the criteria themselves have previously undergone scientific peer and public review and comment and were revised as appropriate. Some human health criteria were updated by recalculating the criteria using revised reference dose information contained and publicly available in the Agency's Integrated Risk Information System. Information in this system was peer reviewed within EPA and, as a matter of policy, is the information which was recommended to the States for their use. Most of these reviews occurred before 1987. Congress acted to amend the Act with full knowledge of the EPA process for developing criteria and the Agency's recommendations under section 304(a). EPA believes it is consistent with Congressional intent to rely on existing criteria rather than engage in a time-consuming reevaluation of the underlying basis for water quality criteria. At some point in the standards setting process the States and EPA must act recognizing that scientific research leading to improved water quality information is an ongoing process. In the case of this rulemaking, EPA affirms that in addition to all the environmental, programmatic, and statutory factors supporting the rule, the basic criteria methodologies are scientifically sound as are the resulting criteria.

In the five years since the February 1987 enactment of section 303(c)(2)(B), most States have worked extensively to adopt water quality standards for toxics pollutants. The issues in this proposal are the same ones that States, dischargers, public interest groups, and EPA have discussed and debated in-depth during those deliberations. The comments prepared for State and EPA meetings and hearings are to a great extent the same as those to be made on this Federal action and made it easier for the commenters to prepare submissions on this rule. The arguments presented in the public comments that EPA's action is new or that the States are not in compliance because they are

carefully reviewing their standards all tend to ignore the fact that many of the criteria were available as early as 1980. Because of a lack of State action, EPA made it a priority emphasis in the revision to the water quality standards regulation in 1983 and, most importantly of all, that section 303(c)(2)(B) was not the start of the process but the signal from Congress that delays had to cease. It is now eleven years after the criteria were first made available to the States, five years after Congress specifically directed the States to Act. Given this background, 30 days was sufficient for commenters to prepare and submit meaningful comments. The extensive nature of the comments submitted support this position. Further delay in the process is totally unwarranted for all of the above programmatic, health, ecological, and statutory reasons.

110. *Comment:* EPA should promulgate criteria only for those pollutants clearly shown to be interfering with designated uses.

Response: The record supporting this proposal contains extensive data on the toxic pollutant problem in each State. It shows the presence of numerous toxics in State waterbodies and it also contains information on impaired waterbodies. Earlier in this preamble, in section E-2 of this preamble, we described that rationale for why EPA could not undertake extensive studies in each State.

In responses to previous comments earlier in this section, we described EPA's legal authority to undertake this promulgation action including why it is not necessary for EPA to promulgate standards pollutant-by-pollutant, waterbody-by-waterbody. In summary: (1) EPA has sufficient data to indicate the widespread presence of toxic pollutants, (2) administratively, given the statutory schedule for promulgation, Congress clearly never intended EPA to conduct in-depth State analysis, (3) EPA, in its December 1988 guidance on options to meet the statutory requirement of section 303(c)(2)(B) indicated a policy position that " * * * the presence or potential construction of facilities that manufacture or use priority toxic pollutants or other information indicating that such pollutants are or may be discharged strongly suggests that States should set standards since such pollutants have the potential to or could be interfering with attaining designated uses", (4) neither the Act nor EPA's regulation limits the establishment of standards to a waterbody-by-waterbody, pollutant-by-pollutant approach, (5) as a matter of public policy to protect human health

and the environment, it is the Agency's position that a more conservative approach is warranted, and (6) actual dischargers of such pollutants should expect to have control limits placed in their permits for such pollutants while other dischargers will not be affected.

111. *Comment:* Since EPA published a range of risk levels in its water quality criteria documents, it should allow a range in this rule or allow States to select the appropriate risk level.

Response: EPA's publication of a range of risk levels in individual water quality criteria documents was simply an illustration of how the criteria recommendations would be affected by adopting various risk levels. It was not intended to nor did it, in fact, establish a policy on risk levels.

Consistent with recognizing the primary authority of States to adopt water quality standards and that Agency policy allows States to select an appropriate risk level within the general range of 10^{-4} to 10^{-6} , EPA modified this final rule to apply the human health criteria at the risk level adopted or proposed by the State for all or a majority of toxic pollutants under applicable State water quality standards regulations, or in the case of Idaho, Nevada, and Rhode Island, on an expression of State preference. EPA notes that in a majority of cases, the 10^{-6} risk level is the one adopted by the States. In order for the human health criteria to be implemented in water quality programs, a single risk level must be chosen so that a specific numeric limit is established for a pollutant. The rationale for EPA's choice of a risk level for each State in this rule is contained in section G-1 of this preamble.

Any State adopting its own standards that meet the requirements of the Act may adopt a risk level other than that used by EPA in this rule. The ability of a State to select an alternative risk level is one of the reasons EPA encourages each State to adopt its own water quality standards rather than rely on Federal promulgation.

6. State Issues

Alaska, Washington, and Idaho

112. *Comment:* Alaska, Washington and Idaho have noted errors in the proposed rules. In some cases these errors were improper citations, or the inclusion of, or failure to include, certain criteria.

Response: EPA sought comments on the interpretation it had made of the various State water quality standards that were potentially affected by the proposed rulemaking. EPA expected

and received comments on the appropriateness of the individual criteria groups applied to the State beneficial use designations.

In deciding which changes it can make to the proposed rules EPA notes that the preamble to the proposed rule laid out the intent and purposes of this action extensively. Beginning on page 58431 of the preamble to the proposed rule, EPA described the 12 "rules" or logic used to derive the criteria applicable to States judged not in compliance with CWA section 303(c)(2)(B). The gist of this rationale was for EPA to apply aquatic life criteria to State-defined designated uses providing even minimal support to aquatic life survival; and human health criteria to State-defined designated uses providing for public water supply and/or aquatic life consumption. Moreover, EPA provided in the matrix in proposed 40 CFR 131.36(b) all of the numeric levels that it proposed for application to the designated uses. Thus, EPA believes that sufficient notice was provided as to the purpose of the proposed rule, the types of affected State designated uses and the identification and stringency of the section 304(a) criteria to provide the Agency some latitude in deleting and adding criteria, especially when these changes are made because of comments made by the affected States and are necessary to correct unintended mistakes.

After discussing this comment with the State of Alaska, it was agreed that the following changes to the rule were necessary. These changes occur in 40 CFR 131.36(d)(16)(ii).

The State's current water quality standards (WQS) reference "Gold Book" criteria for all uses included in the rule except secondary contact recreation. Because the promulgated numbers are, in essence, revised Gold Book criteria, to be consistent with State WQS, EPA applied aquatic life and human health numbers to all uses except secondary contact. Secondary contact recreation is included because it is defined in the State's standards as including fishing. D1 criteria are applied to the drinking water use. D2 criteria are applied to all uses except drinking water for both fresh and marine waters. All acute aquatic life criteria are included in this rule. (See correspondence between the State and EPA in the record.) Also, all human health criteria for carcinogens based on the fact that the State has not adopted a risk level and therefore, cannot calculate or apply appropriate criteria for carcinogens. The chronic aquatic life criterion for selenium as it has been updated since publication of the Gold Book and made more stringent.

The seafood processing use (2)(A)(ii) was deleted from rule because it is an industrial use category to which the criteria promulgated today do not appropriately apply.

Additionally, in 40 CFR 131.36(13)(iii), the risk level for carcinogens was changed to 10^{-5} to reflect the State's July 1992, proposal to amend its water quality standards and to reflect an indication of State policy preference received on November 16, 1992.

The following changes were made with respect to the State of Washington. After discussion with the State, EPA has assigned appropriate criteria to use categories rather than to classes. The rule was revised as follows (see 40 CFR 131.36(d)(17)):

(22)(i) Fish and Shellfish

Fish

Water Supply (domestic)
Recreation

(22)(ii) Fish and Shellfish; Fish

B1 and B2—#2, 10

C1—#2, 10

C2—#2, 6, 10, 14

Water supply (domestic)

D1—All

Recreation

D2—All marine waters

D2—freshwaters not protected for domestic water supply

The following changes were made with respect to the State of Idaho. After discussion with the State, EPA renumbered the use classifications to reflect the reorganization of the State standards and made the following changes in the criteria assigned (see 40 CFR 131.36(d)(18)):

1.b Domestic Water Supplies

Remove cyanide and asbestos

3.a Primary Contact Recreation

Remove B1—All

Remove B2—All

Add D1—All

3.b Secondary Contact Recreation

Remove B1—All

Remove B2—All

Alaska

113. *Comment:* EPA has incorrectly included CMC (acute) aquatic life criteria for freshwater and saltwater for Alaska in the proposed rule.

Response: EPA's inclusion of CMC aquatic life criteria in the rule is appropriate. Alaska's water quality standards state that, "Substances shall not * * * exceed criteria cited in EPA, Quality Criteria for Water." Whether or not the State has adopted both acute and chronic criteria by reference is ambiguous and requires clarification through this rulemaking, especially in light of language included in the

following three documents issued by the State:

1. The State's Water Quality Standards Workbook, published in July 1991, and widely distributed in order to "understand what water quality standards and criteria are, how to interpret the Alaska water quality standards regulation * * *", states that, "* * * EPA has developed a two-number criterion for acute and chronic conditions. The state adopts only the chronic criterion."

In the same state WQS workbook, Table 1, "Alaska's Water Quality Criteria for Toxic Substances in Freshwater and Saltwater", is said to "represent the toxic substances criteria adopted by reference in the AWQS." This table does not include any acute values for the priority toxic pollutants.

2. An August 30, 1991 letter from John A. Sandor, Commissioner of ADEC, to Harold Geren, Chief of EPA Region 10's Water Permits and Compliance Branch, states, "The Department affirms its decision to continue to use "Gold Book" chronic criteria to establish receiving water criteria and effluent limits in NPDES permits." (emphasis added)

114. *Comment:* Alaska was not informed of EPA's intention to include acute criteria in this rulemaking.

Response: On November 4, 1991, EPA Region 10's Water Division Director sent via fax and hard copy, a letter to ADEC's Chief of Water Quality Management, notifying the State of EPA's intention to include acute criteria in this rulemaking. The letter stated, "These letters affirm Alaska's use of "Gold Book" chronic criteria for freshwater and marine systems and have convinced us that Alaska is in compliance * * * with the following exceptions: * * * Acute aquatic life criteria for all pollutants * * *."

115. *Comment:* The statement included in the rule that, "Alaska is included in today's proposal because although the State had previously adopted all section 304(a) criteria by reference, the State Attorney General has decided that the adoption by reference is invalid", is in error and should be deleted from the final rule.

Response: EPA concurs that the statement was in error and no such statement is included in this final rule.

Arkansas

116. *Comment:* Any promulgation of human health criteria for the State of Arkansas should be withdrawn from the rulemaking because the state has adopted such criteria.

Response: A State's standard must be reviewed and approved by EPA before

the State can be removed from the rule. Arkansas formally submitted their water quality standards containing human health criteria to EPA on December 17, 1991. EPA's review found that the human health criteria were supportive of designated uses and therefore no human health criteria are promulgated in this rule. The State's criteria to protect human health were approved by EPA on January 24, 1992. EPA also disapproved Arkansas' water quality standards for failing to adopt the criteria for priority pollutants to protect aquatic life as required by section 303(c)(2)(B). Necessary aquatic life criteria are promulgated today and include the following: Cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, zinc, and cyanide.

117. *Comment:* Arkansas is not required by the Act to adopt numeric criteria for metals because it has not been established that the metals listed "could reasonably be expected to interfere with those designated uses adopted by the State."

Response: EPA's policy is that the presence of any Section 307(a) pollutants raises an issue as whether they could reasonably be expected to interfere with designated uses. The presence in ambient waters and the discharge of metals is documented in several databases, including the Toxic Release Inventory, STORET, and discharge monitoring reports. The State could have submitted supporting documentation that demonstrates that the presence or discharge of these metals is not expected to interfere with designated uses. The State submitted no such information. In the absence of any demonstration to the contrary, EPA must conclude that the metals can reasonably be expected to interfere with designated uses.

118. *Comment:* The documentation on which EPA based its assertion that designated uses "could reasonably be expected to be interfered with" should be provided under this rulemaking process.

Response: The documentation that showed the widespread occurrence of metals in Arkansas' waters in concentrations exceeding EPA's recommended levels was part of the record for this rulemaking and was available for review at the Region 6 office as well as at EPA headquarters.

119. *Comment:* All pertinent data developed by EPA under the 304(1) process should be made available without special request to ensure its availability to potentially affected parties.

Response: The material developed by the States with respect to section 304(1)

was publicly available at the time the list was compiled. A complete discussion of the relationship between the 304(l) list and today's rule is included earlier in this section. Moreover, because EPA did not rely on the State's section 304(l) materials for this rulemaking, it was unnecessary to place such materials in the record.

California

120. *Comment:* A commenter urged that the national rule should clarify that no criterion continuous concentration for selenium less stringent than 5 µg/l will be allowed in California's San Francisco Bay. Commenters suggested that the National Rule should direct Region IX to develop site-specific criteria for selenium in San Francisco Bay. It was further suggested that the National Rule should state that the 5 µg/l selenium criterion (B2) applies only to fish and aquatic invertebrates, not to more sensitive uses such as wildlife. The narrative standards should govern for the more sensitive uses.

Response: This rule promulgates EPA's freshwater criteria for selenium of a CCC of 5 µg/l (4 day average) and a CMC of 20 µg/l (1 hour average) for San Francisco Bay and Delta. In EPA's November 6, 1991 approval letter on California's Enclosed Bays and Estuaries Plan, EPA approved California's decision to allow regional water quality control boards (Regional Boards) to determine where in an estuary it is appropriate to apply freshwater or saltwater criteria. Although most Regional Boards have not yet specified the appropriate standard, EPA generally agrees with this process. However, the EPA standards approval letter specifically found that utilization of the saltwater criteria for selenium in the San Francisco Bay/Delta would be inappropriate. This finding is based on substantial scientific evidence that there are high levels of selenium bioaccumulation in San Francisco Bay and the saltwater criteria fails to account for food chain effects. Accordingly, in the absence of Regional Board action consistent with EPA's approval letter, EPA is promulgating the freshwater criteria for selenium for the San Francisco Bay/Delta. EPA's criteria for selenium in freshwater are derived from laboratory and field data on the effects of selenium on aquatic vertebrates, invertebrates and plants and should be protective of aquatic organisms under most conditions. The selenium criteria were not developed with the intent to address protection of wildlife such as waterfowl. EPA is in the process of developing wildlife criteria for selenium. Recent studies and

analyses have enhanced our understanding of avian exposure to selenium in the field and have clarified the importance of food chain biomagnification and low level toxic effects on avian reproduction. Such information is, for the most part, new information available after the Water Quality Criteria for Selenium was published in 1987. EPA supports the efforts of the State to develop selenium criteria based upon food chain biomagnification. However, in the absence of a final wildlife criteria document, or other sufficient information, EPA is unable to promulgate a criterion more stringent than 5 µg/l as part of this rulemaking. The purpose of this rule is to establish Federal criteria for all waters that do not have EPA-approved state criteria. It is not appropriate to use this Federal rule as a mechanism for directing promulgation efforts of a region. Further, EPA's regulations, guidance documents, and the Preamble to the Federal rule clearly specify the steps to be taken when a state wishes to adopt site specific criteria. EPA believes that it is already clear that both the numeric and the narrative standards apply in all cases. This information is contained in EPA's guidance documents and does not need to be reiterated in this rulemaking.

121. *Comment:* EPA should promulgate freshwater selenium criteria in California for the Sacramento-San Joaquin Delta, the inland surface waters including the San Joaquin River, and the Central Valley Wildlife refuges.

Response: The draft rulemaking proposed the national selenium criteria for all water bodies in California and included those listed above. On November 6, 1991, EPA approved California's Inland Surface Waters Plan which adopted EPA's selenium criteria for freshwater bodies with the exception of Salt Slough, Mud Slough, and the upper San Joaquin River. EPA approved the State's selenium criteria but did not approve these exceptions. Accordingly, the final national rule promulgates the EPA freshwater criteria for selenium for Salt Slough, Mud Slough, and the upper San Joaquin River. The State's freshwater selenium criteria will apply elsewhere in the Sacramento-San Joaquin Delta and San Joaquin River. The California Inland Surface Waters Plan also included a selenium criterion of 2 ppb for the inflow to Grasslands Area Wildlife Refuge in the Central Valley that is more protective than EPA's criteria. This selenium criterion was approved by EPA and, therefore, today's promulgation will not apply to

the inflow to Grasslands Valley Wildlife Refuge.

122. *Comment:* Several commenters asserted that: (1) Past efforts to develop site specific objectives for San Francisco Bay demonstrate the technical difficulties, costs, and uncertainty of developing site specific criteria and; (2) those difficulties make site-specific criteria ineffective in amending inappropriate national criteria.

Response: EPA approved the water quality criteria adopted by California in the Enclosed Bays and Estuaries Plan on November 6, 1991. EPA has revised today's rule so that it does not include pollutants covered by those state-adopted, EPA-approved criteria, except for selenium as described in the previous comment and response. The San Francisco Bay is a highly complex estuarine system. In such cases, developing site specific criteria may be difficult. In October 1991, EPA made technical comments on the site specific objectives proposed for San Francisco Bay. The site specific criteria for San Francisco Bay have not yet been adopted by the State and, therefore, it is premature to evaluate their effectiveness. EPA has approved site specific criteria in several States and recommends that site specific criteria be developed where physical or chemical characteristics of the site alter the biological availability of the chemical or where species at the site are more or less sensitive than those species used in the development of national criteria. Please see Science and Implementation under general comments.

123. *Comment:* A commenter indicated that Region IX has placed impediments on the adoption of site-specific criteria which make future adoption of site-specific criteria an unrealistic alternative.

Response: There is no indication what "impediments" the commenter refers to, or the action by which Region 9 allegedly created such impediments. Please see Implementation under general comments about requirements for site-specific criteria.

124. *Comment:* EPA also received comments that the proposed rule would establish inappropriate and technically unsupported criteria for copper, nickel, lead, and mercury for South San Francisco Bay.

Response: The final rule has been amended to reflect EPA's November 6, 1991 action on California's Enclosed Bays and Estuaries Plan and does not include criteria for copper, nickel, mercury or lead for San Francisco Bay. EPA generally approved California's approach directing regional boards to choose between two sets of criteria

(freshwater or saltwater) in an estuary. California's saltwater and freshwater criteria are approved by EPA. At this point, EPA does not have sufficient information to conclude that this approach of allowing Regional Boards to choose between the two sets of criteria is inappropriate for copper, nickel, lead, and mercury in the South Bay. Therefore, criteria for these metals are not included in this final rule.

125. *Comment:* Several commenters questioned the appropriateness of promulgating EPA criteria for special water bodies such as ephemeral streams, constructed agricultural drains, effluent-dominated streams, irrigation-flow dominated streams, or evaporation ponds.

Response: The criteria contained in this rule apply to all "waters of the United States" as defined in the Clean Water Act and implementing regulations except where State-adopted/EPA-approved criteria apply. Waters of the U.S. may include human-constructed water bodies. Waters of the U.S. does not include waters that fall under EPA's waste treatment system exemption. California deferred adopting water quality standards for certain effluent-dominated streams and irrigation-flow dominated streams. This deferral was disapproved by EPA in its letter dated November 6, 1991 on the basis that it did not protect the water bodies from toxics that are reasonably expected to interfere with designated uses. EPA Region IX agrees with California that site specific criteria would be appropriate for many waters in these categories. If California adopts and EPA approves site-specific criteria that protect the designated uses, criteria for those waters will be removed from this final rule.

126. *Comment:* Several commenters found it impossible to comment on the proposed rule in the short comment period provided. Specifically, commenters noted that the thirty-day comment period is unreasonable and unfair for California given Region IX's delay in acting on California's own water quality standards.

Response: Commenters had more than five weeks to review Region IX's November 6, 1991 action, including thirty days to compare it to the proposed Federal rule. Also, please see general comments under Timing and Process.

127. *Comment:* EPA was not mandated to propose standards for California at this time, especially in light of Region IX's November 6, 1991 action on California's standards. The Clean Water Act contains no specific deadline for EPA to propose standards

and does not require standards to be proposed for the entire nation at once. California could be separated from other states in order to allow reasonable time to evaluate both actions.

Response: On November 6, 1991, Region IX disapproved California's failure to adopt numerical criteria for all 307(a) pollutants for all "waters of the U.S." in California. According to EPA's water quality standards regulations (40 CFR part 131), the State has a 90-day opportunity to correct any deficiencies and EPA may then approve adequate corrections. If the State does not adopt the necessary corrections (or additions) within that period, then EPA must "promptly" propose and promulgate Federal standards in place of those deficient State standards. (Clean Water Act, section 303(c)(4)(A); 40 CFR 131.22.) In this instance, Federal promulgation occurred more than 90 days after November 6, 1991, and took into account any and all changes adopted by the State during those ninety days. To further delay promulgation for California when EPA is prepared to act on California's standards concurrent with other States is unnecessary. As to the adequacy of time to evaluate both actions, see response to preceding comment.

128. *Comment:* California commenters stated that it is unclear whether Federal or State criteria would apply to waters which California exempted, since EPA disapproved this exemption.

Response: California, by exempting certain waters from its 303(c)(2)(B) criteria, failed to adopt such criteria for those waters. EPA's disapproval of the exemptions did not bring about an adoption which the State never made. With this rulemaking, EPA adopts criteria for all 307(a) priority pollutants for those exempted waters which are Waters of the U.S. See additional comments below.

129. *Comment:* It is unclear which of California's use classifications are considered aquatic life or human health classifications. The proposed rule equates aquatic life protection with aquatic life consumption and states that waters with any aquatic life designation must meet human health criteria. A commenter indicated that assigning fish consumption for any aquatic life segment is equivalent to Federal promulgation of new designated uses and should not be done in this rulemaking.

Response: California's basin plans identify specific aquatic life and human health uses that are to be protected in a particular waterbody. EPA has no intention of changing designated uses in this rulemaking. As stated in the

proposed rulemaking, States may remove the human health use classification for waters which have aquatic life but no existing aquatic life consumption uses. California, however, applies human health protection for fish consumption statewide to all navigable waters through the Inland Surface Waters Plan, Enclosed Bays and Estuaries Plan, and Ocean Plan. Therefore, the Federal rule is based on the presumption that, for all navigable waters of the State, aquatic life is present, fish or other aquatic life are being caught and consumed, and human health protection for fish consumption is necessary. It is consistent with EPA's established water quality standard regulations to require States to include all uses identified in Section 101(a) of the Act for all waters unless removed through an approved use attainability analysis. (See 40 CFR 131.10(j)). In this rulemaking EPA has not included the human health criteria (based on fish consumption) for any segments for which a State has conducted, and EPA has approved, a use attainability analysis to remove fish consumption as a use. Please see Legal Authority under general comments.

130. *Comment:* EPA's claim on 56 FR 58422 at p. 58431 that comprehensive Federal promulgation of standards place "no undue or inappropriate burden on States or dischargers" is unsubstantiated and believed to be untrue in California. The economic impacts of complying with Federal criteria are believed to be enormous particularly for publicly owned treatment works (POTWs) and are likely to discourage water reclamation projects.

Response: The commenter provides no explanation as to why complying with Federal criteria will discourage water reclamation projects. EPA is unconvinced that this would be the case. Please see Economics under general comments in response to economic impact concerns.

131. *Comment:* The commenter is concerned about the use of 10^{-6} risk level criteria as opposed to MCLs for protection of drinking water.

Response: California does not have any water bodies where drinking water is the sole exposure pathway. Therefore, MCLs may not be sufficient to protect human health from exposure to toxics from combined drinking water and fish consumption pathways. See section F-5 for a more detailed discussion of risk levels included in this rule.

132. *Comment:* The commenter is concerned that State schedules of compliance will not apply to Federal criteria.

Response: Federal criteria will be implemented in accordance with existing state adopted compliance schedules. For a detailed discussion of this subject see a response to comment in subsection 4 of this section.

133. *Comment:* A commenter asserted that EPA did not do enough to educate the State early on of the 303(c)(2)(B) requirements and that EPA's final 303(c)(2)(B) guidance was not transmitted to the States until December 12, 1988, almost two years after the 1987 amendments. This delay left California with inadequate time to adopt criteria on a pollutant-by-pollutant and water body-specific basis, and consider the scientific uncertainties relating to the Federal data and methodologies.

Response: As stated in the Preamble to the proposed rule, the December, 1988 guidance was not substantially different from earlier drafts which were available for review by the states. That guidance proposed a pollutant-by-pollutant and waterbody specific approach as an acceptable option. While recommending certain approaches, the guidance also made it clear that States retained flexibility to implement their own preferred approaches. Please see Science and Timing and Process under general comments.

134. *Comment:* One commenter stated that Region IX's requirement that California adopt criteria for all priority pollutants is erroneously based on statements in California's Functional Equivalent Documents and is inconsistent with national guidance. Another commenter stated that this requirement was unfounded.

Response: Region IX has consistently advised California that it must adopt criteria for all pollutants for which EPA has section 304(a) criteria recommendations, with the exception of any pollutants which cannot reasonably be expected to interfere with designated uses. Omission of any such pollutant must be based on evidence concerning the presence and effect of that pollutant in any given waterbody. This policy is consistent with national guidance, the history of which is set forth in Part B2 of the Preamble of November 19, 1991. None of the guidance options has ever allowed the exclusion of any such pollutant from the requirements of section 303(c)(2)(B) without a factual scientific basis. In the absence of such scientific basis, EPA relied on California's draft Functional Equivalent Document which stated that "it is likely that priority pollutants not covered in this plan will be found (in the State) in a more extensive analytical survey." This statement is sufficient basis for EPA to have determined that all priority

pollutants would reasonably be expected to interfere with designated uses in all waters of the State.

135. *Comment:* The Federal criteria are more stringent than necessary for some water bodies in California.

Response: Without specific information about which pollutants and which water bodies the commenter is referencing, EPA has difficulty responding to this comment. In the absence of such specific information, EPA determined that it was appropriate to adopt EPA's section 304(a) criteria for all "waters of the U.S." that lack State-adopted, EPA-approved criteria. If, based on further scientific information, the State adopts site-specific criteria which are less stringent than the Federal criteria but, in EPA's judgment, fully meet the requirements of the Act, EPA will undertake a rulemaking to remove the affected pollutants from the Federal rule. For additional information, please see Science under general comments.

136. *Comment:* Major wastewater dischargers in California have filed a petition in State court to restrain the State from utilizing its section 303(c)(2)(B) standards for inland waters, bays, and estuaries. They filed the petition out of concern over significant economic impacts caused by blanket imposition of the [EPA] criteria. The filing of the petition illustrates the concerns of many public agencies over use of EPA criteria as national standards.

Response: The petition referred to in this comment is a challenge to section 304(a) criteria which have been adopted by the State. It is a pending proceeding in State court and does not affect today's rulemaking. The commenter states that this matter reflects a widespread concern over adoption of section 304(a) criteria as national standards. That concern is apparent in the comments received from several entities, particularly in California, and they are addressed in the Economics under general comments.

137. *Comment:* A commenter stated that "only marine criteria should be selected for enclosed bays in California since these are, by definition, indentations along the coast which enclose an area of oceanic water. It is not appropriate to apply freshwater criteria to these water bodies." The commenter also indicated that States should be given the discretion to determine when freshwater or salt water criteria should apply in an estuary.

Response: State standards in California's Inland Surface Waters and Enclosed Bays and Estuaries Plans have been approved for most of the priority toxic pollutants. These standards

include both freshwater and saltwater uses and leave the selection of appropriate criteria to the regional boards. EPA approved the two sets of criteria on November 6, 1991. The Federal rule has been amended to reflect this approval. The final Federal rule applies to those parameters and also to water bodies where State standards are lacking or not protective. The regional boards shall determine for both State and Federal criteria whether freshwater or saltwater criteria are appropriate at the confluence of the water bodies with different water quality objectives.

District of Columbia

138. *Comment:* The adequacy of new human health criteria has not been proven to be germane to the District of Columbia.

Response: As a general proposition, EPA is applying criteria for all priority toxic pollutants not addressed by approved State criteria for those States not in full compliance with section 303(c) of CWA. EPA's reasoning behind this approach (and the exceptions) are discussed fully in the preamble. However, two reasons deserve repeating here. First, existing data sources indicate the discharge, potential discharge or presence of substantial numbers of priority toxic pollutants in most States. With the failure of some States to adopt toxic criteria in a timely fashion, coupled with the evidence of the discharge or potential presence of priority toxic pollutants for which the State has failed to adopt criteria, the Agency believes there is a need for numeric criteria for most priority toxic pollutants in most States. Second, the support of each criterion on a state-by-state and waterbody-by-waterbody basis by EPA would be an enormous administrative burden on EPA and would be contrary to the statutory scheme and Congressional directive for swift action. Congress directed EPA to accomplish the promulgation within 90 days and EPA has made every effort to expedite this rulemaking. Providing the adequacy for all criteria for all States would take years and would be counter to the directive of swift action.

Florida

139. *Comment:* One commenter stated that, since the State of Florida adopted numeric criteria on December 7, 1990 based on Option II of EPA's section 303(c)(2)(B) guidance, the Federal rule should not include criteria for all priority toxic pollutants.

Response: Since the time that the proposed rulemaking was published, Florida formally requested EPA's review of the criteria adopted by the State on

December 7, 1990. EPA approved these criteria, with the exception of the absence of criteria for 2,3,7,8 TCDD (i.e., dioxin) on February 25, 1992. Therefore, EPA has only included criteria for 2,3,7,8 TCDD for the State of Florida in the final rulemaking.

Kentucky

140. *Comment:* One commenter stated that Kentucky has proposed and adopted a revision to 401 KAR 5:031 which deletes the previously adopted numeric human health criteria for dioxin. A request was made by the commenter that EPA's determination of full compliance for Kentucky for the section 303(c)(2)(B) requirement be considered and a Federal water quality criteria be promulgated through this Federal rulemaking. Alternatively, a request was made that such criteria be established as an interim final rule in a separate rulemaking.

Response: At the time EPA published the proposed rulemaking, the State-adopted criteria for 2,3,7,8 TCDD for the State of Kentucky was in effect as part of 401 KAR 5:031 (Surface water standards). EPA is aware that the proposed deletion of 2,3,7,8 TCDD criteria was put into effect on January 29, 1992. EPA's position on Kentucky's proposed deletion of the State-adopted dioxin criteria was transmitted to Kentucky by letter dated November 21, 1991. In that letter, EPA's Region IV Water Management Division Director stated, "Should the State complete adoption of the proposed amendment without replacing the adopted dioxin criteria with approvable criteria values, I will recommend to the Regional Administrator that the dioxin criteria, or absence of dioxin criteria, be disapproved by EPA. If the State does not adopt criteria within 90 days of EPA's disapproval action, EPA will initiate a promulgation of Federal water quality criteria for dioxin for the State." This continues to be EPA's position on this issue.

Louisiana

141. *Comment:* EPA should not promulgate dioxin standards for Louisiana.

Response: Louisiana submitted to EPA criteria to protect human health for dioxin on December 18, 1991. EPA's review found that the criteria adopted by the State were scientifically defensible and supported the designated uses. EPA approved the State standard on January 24, 1992. Therefore, Louisiana is not included in today's rule.

Nevada

142. *Comment:* A Nevada commenter suggested that Column D1 criteria should apply only at the point of intake of any municipal or domestic supply.

Response: Column D1 criteria are to apply to all waters designated by the State of Nevada for municipal or domestic supply. In the case of Lake Mead, that is the entire lake except for the segment at the end of Las Vegas Bay recognizing that Las Vegas Wash enters there. All of Lake Mead is subject to human consumption of water either directly from the lake or downstream.

143. *Comment:* It was stated that the State of Nevada has already considered and rejected criteria similar to the proposed amendments, and Nevada's decision is not contrary to the requirements of the Clean Water Act.

Response: The State excluded criteria similar to those in the proposed rulemaking from the water quality standard amendments considered for adoption by the Nevada State Environmental Commission (SEC). The State did not provide an adequate justification for this exclusion; therefore, on January 16, 1991, EPA disapproved this portion of the SEC action as being inconsistent with section 303(c)(2)(B). Without substantive justification (such as evidence of lack of presence of particular pollutants in waters of the State) for excluding any of the priority pollutants from State standards, all of them must be added.

144. *Comment:* A Nevada commenter stated that Las Vegas Wash should be excluded from any human health protection for consumption of aquatic organisms under the Federal rule.

Response: The general issue of the applicability of column D2 (consumption of aquatic organisms) criteria is discussed in the preamble and in the Science portion of general comments. Human health protection is required where a fishery, or other aquatic life that can be consumed, is present. Las Vegas Wash has been designed by the State for the use of "Propagation of aquatic life, excluding fish." State regulations clarify that this designation does not preclude the establishment of a fishery. Although the commenter offers anecdotal information that no one fishes in (or eats any kind of aquatic organism from) Las Vegas Wash, no evidence is provided supporting that anecdotal information. No use attainability analysis has been conducted to justify removal or amendment of this use. Also, the State has already adopted (and EPA approved) standards for protection of aquatic life in Las Vegas Wash. Because

of the existing aquatic life use and the potential for consumption of aquatic organisms, EPA has applied column D2 criteria to Las Vegas Wash.

145. *Comment:* A Nevada commenter stated that the proposed rule does not provide sufficient notice as to why certain criteria were included and others excluded from the proposed rulemaking for Nevada.

Response: The rulemaking includes criteria only for parameters that Nevada did not adopt, or, if the State did adopt criteria for a parameter, for parameters that were specifically disapproved. This information was all part of the administrative record associated with Nevada's adoption of numeric standards for toxics in May 1990 and EPA's approval/disapproval on January 16, 1991 and was available to the public prior to the notice of EPA's proposed rule, and during the public comment period for the proposed rule.

New Jersey

146. *Comment:* A commenter argues that New Jersey is in compliance with section 303(c)(2)(B) of the Clean Water Act because the State incorporates section 304(a) criteria, by reference, in their Water Quality Standards Regulation for actions involving the development of water quality based effluent limitations for point sources.

Response: While the State Water Quality Standards Regulation does incorporate section 304(a) criteria by reference, the standards do not specify the application factors necessary to implement criteria (e.g., a risk level for carcinogens). Further, the reference in the water quality standards regulation limits application of these criteria to actions involving the development of water quality-based controls for point sources while water quality standards must serve as the basis for controls on all sources, point and nonpoint.

147. *Comment:* A commenter noted that water quality criteria were not proposed in the promulgation for New Jersey waters classified as PL (Pinelands), or as mainstem Delaware River and Delaware Bay (zones 1C-6).

Response: EPA agrees that, due to EPA oversight, criteria were not proposed in the promulgation for New Jersey waters classified as PL (Pinelands) or as mainstem Delaware River and Delaware Bay (zones 1C-6).

Appropriate criteria for New Jersey waters classified as PL (Pinelands), and as mainstem Delaware River and Delaware Bay (zones 1C-6) are now included in this final rule.

Puerto Rico

148. *Comment:* A commenter stated that EPA's proposed rule presents serious problems regarding its implementation, specifically in determining the waters to which such criteria would be applicable in the Commonwealth of Puerto Rico.

Response: The Puerto Rico Water Quality Standards Regulations is clear regarding the designated uses of all waters of the Commonwealth of Puerto Rico. EPA is assigning necessary and appropriate criteria to support those uses in order to satisfy the requirements of section 303(c)(2)(B) of the Clean Water Act.

149. *Comment:* A commenter stated that the Puerto Rico Water Quality Standards Regulation, which establishes the classifications and designated uses, does not comply with the Federal Water Quality Standards Regulation in terms of the adoption of subcategories of uses, the need to conduct use attainability analyses when standards are exceeded, the adoption of a variety of uses for a single waterbody, and in considering the social and economic needs of the Commonwealth.

Response: While the Federal Water Quality Standards Regulation authorizes the adoption of subcategories of uses, States are not required to adopt subcategories of uses in the establishment of standards. States are not required to complete use attainability analyses (UAAs) when designated uses are not met. Section 131.10(j) of the water quality standards regulation requires that States must complete UAAs when removing designated uses that are not existing uses, or when specifying uses inconsistent with the goals of the Clean Water Act. States may not remove designated uses if they are existing uses. In the establishment of water quality standards and water body classifications, including requisite public participation, Puerto Rico has taken social and economic needs of the Commonwealth into consideration, as well as the inherent differences in levels of protection and water quality required by the various designated uses. Notwithstanding this discussion, the rule only addresses appropriate criteria for priority toxic pollutants. Other elements of State water quality standards are not addressed.

150. *Comment:* It was commented that the Puerto Rico Water Quality Standards Regulation does not recognize the uses of waterbodies that are actually attained.

Response: Designated uses of waterbodies are not required to only reflect those uses that are actually

attained. While the Puerto Rico Water Quality Standards Regulation defines Class SD waters as surface waters intended for use as a raw water source for public water supply and the preservation and propagation of desirable species, not all Class SD waters presently meet these goals. Designated uses need not be existing uses. Consolidation of various uses (i.e., fishing and swimming) into one classification is an acceptable approach for designating uses of waterbodies, and a necessary one in order to meet the goal of the Clean Water Act. Federal regulations require that waters have designated uses that provide for fishable/swimmable water quality where attainable. When establishing criteria to protect these various designated uses, criteria may be specified to protect each use.

Washington

151. *Comment:* The term "water supplies" should be deleted from the Class AA listing in (22)(i) because it is incorrect.

Response: EPA concurs, it was a misprint.

152. *Comment:* Comments were received that EPA should not promulgate criteria for dioxin in the State of Washington. The commenters expressed concerns that EPA's actions would be disruptive and unnecessarily interfere with ongoing State administrative and judicial actions involving Department of Ecology's decisions in establishing effluent limitations in permits issued to numerous pulp and paper mills. The Department of Ecology had established the permit effluent limitations based on the State's existing narrative water quality criterion. The commenters urged EPA to defer action pending the conclusion of the ongoing State actions challenging the State's authority to establish permit limitations based on its narrative criterion. In addition commenters said that the current State regulations met the requirements of section 303(c)(2)(B) and that the State's regulations were equivalent to another State's water quality standards that an EPA region had approved as being in compliance with section 303(c)(2)(B).

Response: EPA carefully considered the comments on this issue and has decided to exercise its discretionary authority under section 303(c)(4)(B) to promulgate human health criteria for dioxin and the other toxic pollutants to be applicable to waters in the State of Washington. This action will ensure that there are numeric water quality criteria applicable in the State as required by section 303(c)(2)(B).

EPA's review of the current Washington water quality standards for toxic pollutants indicates that those standards do not include the necessary water quality criteria to satisfy the requirements of section 303(c)(2)(B). While WAC 173-201-047(1) includes numeric aquatic life criteria, protection of human health is only addressed through a narrative criterion that provides that toxic substances not be introduced at levels which "adversely affect public health, as determined by the department * * *." WAC 173-201-047(4). EPA believes that this limited narrative criterion does not satisfy the requirements of section 303(c)(2)(B).

EPA acknowledges that the Department of Ecology relied upon its narrative criterion to establish effluent limitations for dioxin in State NPDES permits. EPA supported the Department's reliance in its narrative criterion in developing necessary effluent limitations for the control of discharge of dioxin. EPA encourages all States to have narrative criteria for protection of aquatic life, wildlife and human health in instances when the State does not have an applicable numeric criterion. However, section 303(c)(2)(B) is clear in its directive that States adopt numeric criteria for toxic pollutants if EPA has issued section 304(a) guidance and the discharge or presence of such pollutants could reasonably be expected to interfere with designated uses in the State.

In the notice of proposed rulemaking, EPA discussed the basis for its decision to include Washington in the rule. 56 FR at 58477. The absence of any numeric criteria for human health and the acknowledged discharge and presence of toxic pollutants being expected to interfere with designated used supported inclusion of Washington in the rule. With respect to dioxin, the issuance of permits with discharge limitations was further evidence that the discharge or presence of dioxin could reasonably be expected to interfere with designated basis.

EPA does not believe that promulgation of numeric criteria for the State of Washington should be delayed pending resolution of the ongoing litigation challenging the Department of Ecology's authority to establish effluent limitations based on the State's narrative criterion. The State's narrative criterion, while it may be the basis for deriving effluent limitations, is not adequate to satisfy the requirements of Section 303(c)(2)(B). Some commenters argued that Washington had in effect incorporated by reference EPA's Section 304(a) water quality criteria guidance as the basis for interpreting and

implementing the State's narrative criterion. The Washington water quality standards, however, merely provide that for toxic substances not listed in the standards, concentrations shall be determined "in consideration of USEPA's Quality Criteria for Water, 1986, and as revised, and other relevant information." WAC 173-201-047(3). The State standards neither require use of EPA's criteria nor limit the State's decision to use of such criteria. Therefore, even a decision by the Washington Supreme Court that the Department of Ecology is authorized to use its narrative criterion to develop permit effluent limitations would not address the specific requirement of section 303(c)(2)(B) that the State adopt numeric criteria.

In response to the comments that the current Washington regulations are equivalent to regulations adopted by the Commonwealth of Massachusetts which is not included in today's rulemaking, EPA believes there is an important difference between the two State regulations. The Massachusetts regulations provide that in deriving criteria for unlisted pollutants, the State "shall use the recommended limit published by EPA pursuant to section 304(a) * * *." Code of Massachusetts Regulations, Title 314, section 4.05(5)(e). Pursuant to an Implementation Policy adopted on February 23, 1990, Massachusetts stated that it would use a risk management goal of 10^{-6} for individual chemicals and 10^{-5} for mixtures of chemicals in deriving criteria for carcinogens. The regulations contain a specificity regarding what the applicable criteria will be that is not present in the Washington regulations. EPA's Region I determined that the Massachusetts regulations complied with section 303(c)(2)(B) and approved those regulations on December 20, 1990. See 56 FR 58452.

EPA's decision to promulgate appropriate human health criteria for the State of Washington is consistent with the Agency's prior statements regarding the status of Washington's compliance with Section 303(c)(2)(B). In the Federal Register notice of April 17, 1990, EPA identified Washington as not being in compliance with section 303(c)(2)(B). 55 FR 14350. By letter dated March 27, 1990, from the Department of Ecology to EPA, the Department listed the adoption of human health criteria as an action for its triennial review that had been requested by EPA. By letter dated March 21, 1991, from EPA to the Department of Ecology, EPA explained that the State would remain in noncompliance under section

303(c)(2)(B) for human health criteria even if the State proceeded to adopt aquatic life criteria and a human health risk level. These documents are in the record of this rulemaking.

Executive Order 12291

1. Introduction and Rationale for Estimating Costs

Executive Order 12291 requires EPA to prepare a Regulatory Impact Analysis for major regulations, which are defined by certain levels of costs or impacts. For example, the Executive Order specifies that a regulation imposing an annual cost to the economy of \$100 million or more is considered major. According to the Executive Order, the Regulatory Impact Analysis should contain descriptions of both potential costs and benefits. While the Executive Order calls for an estimate of costs, the Statute mandating today's rule does not allow cost to be a consideration in setting water quality criteria. The following discussion describes the Agency's consideration of costs in the rulemaking and decision process even though cost considerations are not included in the development of numeric criteria for toxic pollutants:

In developing the proposed rule, EPA considered various perspectives regarding the potential incremental costs that might be incurred as a result of the Agency promulgating numeric criteria for individual States. The Agency concluded that the costs incurred by individual dischargers as a result of complying with water quality-based permits might be large enough to designate the rule as "major," according to the definitions included in Executive Order 12291. The Agency did not include a quantitative estimate of the costs due to the uncertainties of such an estimate, but instead, described the types of costs that were expected.

There are certain characteristics of the rule that make the estimation of costs particularly complicated and difficult. Since the rule imposes requirements only until the State submits, and EPA approves, the State's own numeric standards, the cost estimates should be calculated on a per State and per pollutant basis, so that State/pollutant combinations can be removed as numeric standards are approved. Additionally, an analysis of the incremental costs attributed to the rule should reflect information on specific impaired stream segments and the dischargers on those segments.

Because a detailed analysis of all affected stream segments is not practical given the available resources, the development of compliance cost

estimates for this rule would require numerous assumptions about pollutant loadings, impacts of technology-based regulations on loadings, combinations of pollutants handled by a given treatment approach, and the costs of each treatment train. The many sources of uncertainty associated with estimating the costs would produce an estimate with limited value for evaluating the merits of the rule. In addition, the rule does not remove the responsibility of States to adopt numeric criteria for toxic pollutants. As the remaining States submit their own standards and EPA approves those standards, the costs attributed to the rule will decline. Hence, EPA, with the concurrence of OMB, proceeded with the proposed rulemaking without a quantitative estimate of compliance costs.

2. Overview of Projected Costs

EPA acknowledges that there will be a cost to some dischargers for complying with new water quality standards as those standards are translated into specific NPDES permit limits. The addition of Federally promulgated criteria for toxic pollutants could affect the wasteload allocations developed for each waterbody segment in affected States to the extent the pollutant is discharged into the stream. Revised wasteload allocations may result in adjustments to individual NPDES permit limits for point source dischargers, and these adjustments could result in increased wastewater treatment costs or other pollution control activities such as recycling or process changes. The magnitude of these costs depends on the types of treatment or other pollution control, the number and type of pollutants being treated, and the level of control that can be achieved by technology-based effluent limits for each industry.

Similar sources of costs and the variables affecting costs may also apply to indirect industrial dischargers to the extent that the industrial discharger is a source of toxic pollutants discharged by the POTW. The POTW may incur costs for expansion, operational changes, additional treatment, modified pretreatment programs, and increased operator training.

Nonpoint sources of toxic pollutants may also incur increased costs to the extent that best management practices need to be modified or applied to more sources to reflect the revised water quality standards. Although there is no Federal permit program for nonpoint sources comparable to that for point sources, there are State regulatory programs to control nonpoint source discharges.

Monitoring programs are another source of potential incremental costs to dischargers and States. Monitoring programs to generate information on the existing quality of water and the types and amount of pollutants being discharged are potentially affected by the imposition of EPA criteria. The addition of Federal criteria for toxic pollutants does not require the State to engage in a program to monitor ambient waters for such pollutants. Unless there is some reasonable expectation that the pollutants are manufactured or actually used in the State with the likelihood that those pollutants will be discharged into surface waters, NPDES permittees also would not have to monitor for these pollutants.

3. Comments and EPA's Response

EPA received numerous comments regarding the potential cost impacts of the rule; most of these comments contend that a Regulatory Impact Analysis is required. Specifically, many commenters asserted that EPA should estimate the costs that dischargers would incur and include such cost estimates in all decision-making aspects of the rule. Some of these comments argued the qualitative discussion of costs did not fulfill the requirements of E.O. 12291.

EPA does not concede that its rationale for not estimating costs was flawed. Rather than appear nonresponsive, however, the Agency recognizes that further discussion is warranted and has undertaken an assessment of potential costs that might be incurred for several types of dischargers.

This cost assessment is not a Regulatory Impact Analysis, nor is it a comprehensive cost analysis. The following discussion is intended to describe the scope and range of costs that might occur. Many analytical assumptions were necessary to conduct this cost assessment, which is presented in the form of four examples. Each example was conducted independently with no common data sources. The examples are not intended to represent an estimate of the total costs of the rule.

The Agency maintains that a comprehensive analysis of costs would not provide enough additional information to assist Agency management with decisions concerning the rule. A complete analysis of costs for this rule would likely include differential costs to comply with various levels of regulatory control. Similarly, an RIA would likely evaluate alternative options for structuring the rule, where the options might reflect various level of stringency. Due to the complexities of

analyzing the impacts of this rule, however, a meaningful cost estimate would be extremely difficult and costly, and it is uncertain whether an RIA would lend reliable information to the decision-making process.

4. Scope of Cost Impacts

Since this rule directly affects only those States that have not adopted their own numeric criteria for toxic pollutants, the cost impacts are limited to dischargers in those States. The cost impacts are further limited by several other factors. First, the potential impact of the rule is limited to treating discharges of only those pollutants included in the rulemaking for each State. In other words, if today's rule imposes criteria for only one pollutant (assuming criteria were adopted and approved for all other pollutants—a situation which occurs for several States), the number of dischargers in that State that might incur compliance costs are limited to dischargers for which that single pollutant drives the treatment needed to comply with their NPDES permit. This situation significantly reduces the number of dischargers with a cost impact. The number of pollutants that could be the basis for additional treatment may be reduced from the number actually included in the rule due to the overlap of controls for groups of pollutants. For example, discharges of several of the metals can be reduced by a single treatment system (generally lime precipitation and clarification) without additional treatment for each additional pollutant in that group.

In some cases, the controls in place—whether installed to comply with technology-based limitations or to comply with a discharge permit issued pursuant to section 304(l) of the Clean Water Act—may be sufficient to provide compliance with water quality criteria. In other cases, controls implemented to meet whole effluent toxicity permit requirements may preclude the need to implement additional controls to reduce a toxic pollutant discharge covered by the rule.

Finally, flow levels, receiving stream conditions, and wasteload allocations are likely to cause variation in the need to install additional treatment technology. For all of these reasons, the Agency believes that the number of dischargers with potential incremental costs is significantly lower than the total number of dischargers in the controlled States.

An estimate of the number of point sources that could be affected begins with the major dischargers from the 14

States included in today's rule.⁵ The focus on major dischargers (where the term "major" refers to the distinction used in the NPDES program for facilities with the potential for a significant impact on water quality) is consistent with the rulemaking's focus on toxic pollutants. Any point source with a significant discharge of toxic pollutants is likely to be included in this category.

The number of major facilities for the 18 States is 2,055. (See Footnote 5.) This is a subset of the approximately 7,000 major dischargers in the entire country (3,000 industrial, 4,000 municipal). Of these, 229 facilities already have Individual Control Strategies (ICS) that were established in response to section 304(l) of the Clean Water Act. These facilities have effluent limitations for toxic pollutants sufficient to achieve water quality standards in the receiving water. Thus, the number of major facilities that potentially could be subject to incremental requirements is 1,826. The exact number is likely to be lower because of the number of regulated pollutants in each State and the current discharges of the facilities.

All of the analytical difficulties described above, such as estimating pollutant loadings and compliance costs, would need resolution to accurately estimate the cost impacts for this group of dischargers. In place of attempting to estimate total costs, the following four examples illustrate the range of costs likely to be incurred in specific situations, and some of the problems involved in developing potential compliance costs for this rule.

5. Example: Regulating Dioxin for the Pulp and Paper Industry

As an example of the range of costs that could be associated with the imposition of EPA's numeric criteria, we considered the pulp and paper industry and the pollutant dioxin.

Dioxin (i.e., 2,3,7,8-TCDD, listed as Compound #16 at § 131.35(b) of the proposed rule) is a likely by-product from chlorine bleaching of chemically-pulped wood. Chlorine bleaching is used by approximately 100 pulp mills in the United States. Of those bleach mills, 22 are located in States that had not adopted human health criteria for dioxin as of the date of the proposed

⁵ When this assessment was prepared, the Agency contemplated that 18 States would be included in the rule. Thus, the estimated costs described in this preamble are based on a "universe" of 18 States. Since then, four States have adopted and EPA has approved priority toxic pollutant criteria. In the examples that follow, the assessment has not been revised from 18 States to 14 States because the objective of the assessment—to describe the scope and range of impacts—is met even with the higher number of States.

rule. (See Footnote 5.) Thus, this rule could potentially serve as the basis for establishing dioxin limitations in the NPDES permits for those facilities. Of the 22 bleach mills in "unapproved" States, however, 13 already have dioxin limitations in their discharge permits, established in response to section 304(l) of the Clean Water Act. Only for the remaining nine facilities, then, will this rule be a potential reason for establishing dioxin limitations in the discharge permits.

For those nine facilities, however, the effluent levels of dioxin, as reported by the facilities, are all equal to or less than 10 parts per quadrillion (ppq).⁶ This effluent data has important implications for projecting costs and impacts. Today's rule will result in water quality standards that contain EPA's human health criteria of 0.013 ppq for dioxin at a 10^{-6} incremental risk level (or 0.13 ppq for States that have expressed a preference for a 10^{-5} incremental risk level). This value would then be reflected in the permits for the facilities that discharge dioxin, after conducting a wasteload allocation and accounting for stream dilution. If the resulting permit limitation is less than 10 ppq, compliance with the permit is likely to be determined at 10 ppq, because that is level of detection for dioxin for the EPA analytical method.

The practical interpretation of the effluent data for these nine facilities is that promulgation of this rule is unlikely to affect the need for treatment and thus, the costs of compliance for water quality-based permits.

These conclusions are very much a function of the laboratory analytical methods and their levels of detection for dioxin. If more precise and reliable measurement becomes available and is incorporated into the monitoring requirements in the permits for these facilities, the small differences between their effluent levels and the more stringent water quality-based limitations could present the need for additional treatment or revised production processes.

The Agency has collected extensive information about the pulp industry's efforts to reduce dioxin discharges from chlorine-bleaching facilities. The industry has responded to the need to reduce dioxin (and related chemicals) discharges with a variety of technological advancements. These include process refinements, such as

changing input chemicals or altering the bleaching process. These types of changes are not necessarily prohibitive in terms of investment cost or operating costs. Substantial dioxin reductions have been achieved at little or no incremental compliance costs by changing certain process chemicals. For example, a change to dioxin precursor-free brownstock defoamers has been successful in reducing dioxin discharges at virtually no change in chemical cost and with no additional equipment. Other process chemical changes, however, can result in increased costs. For example, increased chlorine dioxide substitution, which is often accompanied by increased chlorine dioxide generation on-site, has been adopted by various facilities at an investment cost of approximately \$20 million each. At the costly extreme, dioxin discharge reductions at other facilities reflect major renovations, not only to reduce dioxin discharges, but to modernize or otherwise restructure the facility. For example, a facility might choose to rebuild its bleach plant and adopt an entirely new bleaching process. Costs for this type of rebuilding may reach \$100 million.

In summary, the costs associated with meeting an EPA-imposed dioxin limit can be estimated only with information on the bleaching process currently used at each facility, its wastewater characteristics, the characteristics of the receiving stream, and the level of control mandated by a new water quality-based permit. Based on reported effluent levels, however, this rule is unlikely to be the basis for any incremental compliance costs for Pulp and Paper mills to reduce dioxin discharges.

6. Example: Regulating Copper in the Metal Finishing Industry

As a second example of the range of costs that might be incurred as a result of complying with water quality-based permits issued in response to the imposition of EPA's criteria for toxic pollutants, we considered the metal finishing category for the control of the pollutant copper.

Effluent guidelines limitations and standards, which are technology-based regulations developed by the Agency pursuant to section 304 of the Clean Water Act, were promulgated for this industry in July 1983. Briefly, the effluent guidelines for the metal finishing industry set national standards for all dischargers to surface waters and to wastewater treatment plants (sometimes called publicly-owned treatment works, or POTW). The effluent guidelines for the metal

finishing industry include numeric limitations for copper, based on the Best Available Technology Economically Achievable (BAT), for direct dischargers. The limitations for copper, as promulgated, are a daily maximum of 3.38 mg/l and a monthly average of 2.07 mg/l. The technology basis for these limitations is generally lime precipitation and clarification.

When the Agency promulgated effluent guidelines for this industry, the estimated number of direct dischargers subject to the regulation was approximately 2,900. In the Agency's permit compliance database, which reflects a more recent assessment, there are approximately 4,000 metal finishing direct dischargers. The higher, and more conservative number (in terms of projecting the number of affected facilities) is used in this assessment.

Of the 18 States included in this assessment, only six will receive EPA's aquatic criteria for copper; the remainder have already adopted aquatic criteria for copper in their standards.⁷ (See Footnote 5.) Approximately 530 of the direct dischargers are located in these six States (where two States account for 93 percent of the facilities).

The number of potentially affected facilities is further reduced for several reasons. First, the number of facilities that would actually be considered for water quality-based permits could be lower, after subtracting any facilities that have individual control strategies (ICSs) to control the discharge of copper. In addition, the Agency has provided a formula in today's rule to allow the permitting authority to determine a water-effect ratio to account for metals speciation. The practical result is that, where determined, the water quality criteria for copper in certain waterbodies is likely to increase. This adjustment will have the effect of bringing the water quality-based limitation closer to the BAT limitation; for some facilities, this water-effect adjustment could eliminate the need for incremental treatment.

Finally, depending on site-specific conditions at each facility, such as the actual discharge concentration of copper, treatment-in-place, and the dilution provided by the receiving stream, complying with the in-stream concentration specified in the rule could be achieved by merely complying with BAT limitations. Alternatively,

⁶ U.S. Environmental Protection Agency, Engineering and Analysis Division, "1990 National Census of Pulp, Paper, and Paperboard Manufacturing Facilities—Preliminary Summary Report of Questionnaire Responses for Mills Which Bleach Chemical Pulp," October 31, 1991.

⁷ For metal pollutants, such as copper, the aquatic criteria tend to be more stringent than the criteria based on protecting human health. For purposes of this assessment, EPA is estimating impacts related to the aquatic life protection criteria because those criteria are more relevant for establishing water quality standards.

since the in-stream water quality criteria is more stringent than the discharge limitation established by BAT, it is possible that a facility complying with BAT would need additional treatment to comply with a water quality-based limitation.

For purposes of this assessment, EPA investigated whether BAT would be sufficient to meet water quality criteria. Many simplifying assumptions are incorporated into the following discussion. The investigation focused on metal finishing facilities with water releases of the metal pollutants (including, but not limited to copper) as reported in the Toxic Release Inventory.⁹ The facilities included in this assessment were limited to those for which plant and stream flow data were readily accessible. While the number of facilities meeting all of these criteria was small, the results were indicative of both scenarios described above. In Connecticut (which is used for illustrative purposes only because it is not included in the final rule), EPA has identified a facility for which BAT will be sufficient for controlling discharges of copper to the level needed to comply with a water quality-based limitation for copper, assuming EPA's criteria level. At that site, the stream dilution is such that meeting the BAT limitation at the discharge point will also likely meet the water quality criteria within the stream. We have also identified another facility in Connecticut for which BAT will not be sufficient—that is, the effluent levels needed to comply with the water quality criteria in the stream are lower than the level that BAT will provide. Thus, additional treatment controls, and incremental compliance costs, are potentially needed for the second facility.

Without a detailed water quality and stream dilution analysis for all dischargers, the number of facilities where BAT will be sufficient to also meet water quality criteria is unknown. For purposes of this assessment, the distribution of facilities where additional treatment may be necessary is assumed to be between 25 and 75 percent. Additionally, the distribution of facility and stream characteristics for metal finishers in Connecticut is assumed to be representative of the distribution of characteristics in the other States. Using these simplifying

⁹ U.S. Environmental Protection Agency, Toxic Release Inventory, 1989. A search of the Inventory for direct dischargers in the metal finishing industry in the six States yielded 41 facilities. Two of the six States have zero facilities matching that description. The comparisons of BAT and water quality criteria are drawn from that subset of the Inventory.

assumptions, EPA estimates that 130 to 400 facilities are potentially subject to additional treatment requirements.

During the development of the effluent guidelines for this industry, EPA considered several treatment technologies that control pollutant discharges. In addition to the precipitation and clarification technology that was used as the basis for effluent limitations, EPA investigated and published information about effluent filtration, which provides more stringent control of copper discharges.⁹ Filtration was not selected as the basis for BAT because of its high cost when considered on a nationwide basis.¹⁰ The removal efficiency for filtration is substantially higher than that for precipitation and clarification. Based on engineering judgment, if filtration were installed at a facility in addition to the technology used as the basis for BAT, meeting the in-stream water quality criteria for copper would be technologically feasible. Hence, the incremental costs for filtration are used here to estimate the range of costs that might be attributable to this rule.

During development of BAT, the Agency estimated total annual costs to add filtration to precipitation and clarification for various sizes of facilities. The incremental cost estimates used here reflect one of several combinations of manufacturing processes and conditions. The costs are likely to be an overestimate because they reflect the upper bound of each flow size range. The potential incremental total annual costs used to estimate the compliance burden for meeting a water quality-based permit are approximately \$20,000 for small plants, \$43,000 for medium plants, and \$146,000 for large plants. To estimate the costs that might be incurred by the dischargers potentially affected by the rule, we assume that the distribution of facility sizes for those dischargers is the same as the distribution used for BAT development. While specific cost estimates depend on many site-specific factors, the range of costs that could be expected for 130 to 400 facilities are

⁹ U.S. Environmental Protection Agency, Effluent Guidelines Division, Development Document for Effluent Limitations Guidelines and Standards for the Metal Finishing Point Source Category, June 1983.

¹⁰ When establishing BAT, the Clean Water Act requires specific consideration of cost and economic achievability; such consideration is not required when establishing water quality standards. This is not to say that economic considerations are completely outside of the water quality standards process, but that such factors are considered at other points in the process, such as establishing waterbody use classifications. Here, the focus is adopting water quality criteria that are protective of human health and the environment.

approximately \$7 million to \$20 million.

It is likely that the assessment presented here for copper will include meeting aquatic criteria for other metals due to the similarity in treatment technology. Thus, the cost impacts estimated here will likely provide sufficient treatment to comply with the aquatic criteria for most of the metals.

Another means of considering the potential costs is to evaluate the cost-effectiveness of the additional treatment, where cost-effectiveness is defined by the ratio of incremental cost to incremental pollutant removal. The cost-effectiveness of filtration for those facilities projected to need additional treatment is based on the cost estimates shown above and the pollutant removals for not only copper, but five additional metals that will be removed by filtration. Cost-effectiveness ratios are expressed as "dollars per pound-equivalent removed," where a pound-equivalent is a pound of pollutant weighted by the relative toxicity of that pollutant. The cost-effectiveness of filtration for these facilities is \$22 per pound-equivalent removed. This result suggests that filtration is a cost-effective technology.

In summary, the actual burden to dischargers in the metal finishing industry ranges from no impact, where BAT is sufficient to protect the receiving stream, to an incremental cost impact of 5 to 13 percent above the cost of BAT, where filtration is needed. In addition, treatment to comply with more stringent standards appears to be cost-effective.

7. Example: Regulating Priority Pollutants in the Organic Chemicals, Synthetic Fibers, and Plastics Industry

A third example of the range of costs that might be incurred as a result of complying with EPA's criteria for toxic pollutants is based on several segments of the organic chemicals manufacturing industry, where EPA considered the control of all priority pollutant discharges.

Technology-base effluent limitations guidelines and standards were promulgated for this industry in November 1987. The Agency is still engaged in rulemaking activities for this industry in response to litigation and court remands. The following discussion is based on the regulation and supporting documentation from the 1987 final rulemaking.¹¹

¹¹ U.S. Environmental Protection Agency, Industrial Technology Division, Development Document for Effluent Guidelines and Standards for the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category, Volume I, EPA 440/1-87-009, October 1987.

During development of the effluent guidelines for the organic chemicals industry, the Agency considered the potential for pollutant discharges from all of the priority pollutants. Approximately half of the priority pollutants were detected in effluents from chemical manufacturing facilities, and the effluent guidelines for this industry include limitations for most of these pollutants. The technology basis for establishing BAT varies by pollutant and by industry subcategory, but for many subcategory/pollutant combinations is steam stripping and/or biological treatment.

The promulgated effluent guidelines for the organic chemicals industry were expected to control discharges from more than 700 facilities. Of these, 275 are located in the 18 States used in this assessment to analyze the economic impacts of EPA's human health criteria. (See Footnote 5.) The human health criteria are likely to be the more significant values (compared to aquatic life criteria) for purposes of controlling organic pollutant discharges. The number of direct dischargers in the 18 States is estimated to be 90, based on the total industry proportion of direct dischargers. These dischargers are potentially subject to incremental requirements as a result of today's rule.

The key question for estimating the effect of the rule is whether BAT is sufficient to protect water quality to the levels that would be mandated by imposition of the criteria promulgated today. Water quality modelling results suggest very few exceedances of the water quality criteria, after the imposition of BAT requirements.

The level of control provided by the effluent guideline reflects the analytical laboratory level of detection for nearly half of the regulated pollutants. While the maximum monthly average expressed in the effluent guidelines may be higher than the detection limit (to account for variability), the level of detection corresponds to the long-term average of the treatment's removal efficiency. No water quality exceedances were projected among the pollutants that are regulated at levels higher than the detection limit.

The practical effect of the BAT limitations, combined with levels of detection and water quality assessments, is that this rule is unlikely to affect the behavior of chemical manufacturers in terms of pollution control investments. By complying with BAT limitations, the facilities are likely to also comply with more stringent, water quality-based limitations. Even though EPA's human health criteria suggest that permit requirements for

some dischargers will be lower than the level of detection, a facility that cannot demonstrate compliance with the lower permit value is unlikely to add treatment or change processes in response to the revised permit.

In summary, BAT requirements for this industry control nearly half of the regulated pollutants to the level of detection for each pollutant. It is unlikely that the rule will result in incremental economic impacts for direct dischargers in the organic chemicals, plastics, and synthetic fibers industry.

8. Example: Regulating Priority Pollutant for POTWs

The final example of the range of costs that might be incurred as a result of EPA-imposed numeric criteria is for POTWs. An important aspect of regulatory impact for sewage treatment plants is that increases in investment and operating costs are often passed on to consumers in the form of user fees or taxes. For purposes of this assessment, however, we have not extended the cost impacts to household burden.

For POTWs, the choice of treatment technology is dependent on many factors; one of the most important is the pollutant (or group of pollutants) of concern and the source of that pollutant. For example, different technologies are recommended if the pollutants of concern are dissolved organic compounds as opposed to suspended solids. For this assessment, we relied on summary cost information presented in comments the Agency received during development of the Great Lakes Water Quality Initiative and on summary information from a rulemaking that focused on the incremental cost for POTWs to upgrade wastewater treatment.¹² The pollutants of concern and levels of control in those sources are similar to the additional controls that might be imposed by compliance with water quality standards following adoption of EPA's numeric criteria for priority toxic pollutants.

Several comments to the proposed rule contended that reverse osmosis is needed to comply with EPA's criteria for metals. According to commenters, this technology is likely to be very expensive when applied to the high flows found at many POTWs. EPA believes that POTWs often have alternatives to installing this type of treatment technology. These alternatives may be attractive from an overall water quality perspective because they prevent pollution at the source. For

example, it may be less expensive for a small number of indirect dischargers to reduce their metals contribution to the POTW's wastestream than for the POTW to treat all of its effluent.

Copper discharges are another potential source of difficulty for POTWs in meeting water quality criteria. Many drinking water systems use copper to control algae growth. The copper is then discharged to the POTW and then to the receiving stream. Other algae controls, such as potassium permanganate, may be effective for some drinking water systems. This example of an alternative would reduce the copper loading to the POTW's receiving stream without requiring expensive treatment such as reverse osmosis at the POTW. Reverse osmosis was not used in either of the cost sources noted above; nor is it used here. The pollution control technology selected for a POTW depends on various engineering judgments and site-specific conditions. The incremental costs used in this assessment are based on activated carbon for some POTWs and on polymer addition for others. Engineering judgment suggests that many of the organic and metal compounds of concern will be removed in the final effluent with these types of treatment technologies.

The following cost assessment is likely to be an overestimate due to the simplifying assumptions used in this procedure. The number of POTWs that possibly could be subject to incremental costs that are attributable to this rule is first limited to POTWs in those States that had not adopted their own numeric criteria by the time of the proposed rulemaking. A total of 18 States was used to project the number of POTWs (See Footnote 5.) Of the approximately 15,000 POTWs in the U.S., 3,942 are identified as "majors" in the Permit Compliance System. Of these, 952 are located in the 18 States. Even as of the proposed rule, however, this number of POTWs is an overestimate of the number that might incur increased costs because it includes all States projected to receive any pollutant criteria. In fact, many of the 18 states need only a limited number of pollutant criteria (for some States, as few as one).

The number of POTWs that might be subject to new or more stringent permit requirements is further reduced because some portion of those permits already include limitations for some of the pollutants of concern. Such permit limitations and the ICSs were established in response to section 304(f) of the Clean Water Act. Another factor that may eliminate the need for additional treatment by the POTW is the use of whole effluent toxicity limits,

¹² Best Conventional Pollutant Control Technology; Effluent Limitations Guidelines; Final Rule, 51 FR 24974, July 9, 1986.

which are possibly already controlling toxic discharges. In addition, existing treatment and pretreatment may obviate the need for more stringent permit requirements. Other site-specific analyses, such as wasteload allocations and dilution studies are likely to affect the reasonable expectation that a pollutant is discharged. Also, as mentioned earlier, the water-effect ratio calculation is likely to eliminate the need for incremental treatment in certain waterbodies.

For purposes of this assessment, the number of POTWs that will need additional treatment has been estimated by focusing on the results of section 304(l) reviews. During each State's review of dischargers to identify sources that were discharging toxic pollutants at a level that could potentially cause water quality impairments, less than 5 percent of the major municipal dischargers were listed. Applying this proportion to the number of municipal dischargers covered by today's rule yields an estimated 46 POTWs that could potentially cause water quality criteria violations. The provisions of section 304(l) required States to respond to these projected violations by developing Individual Compliance Strategies and permit limitations for toxic pollutants.

The Agency acknowledges that the discharger reviews conducted in response to section 304(l) were not comprehensive and probably undercounted the number of dischargers, including POTWs, that were discharging toxic pollutants. Some of the reasons for undercounting include the lack of monitoring information, quickly-conducted reviews, varying methodologies among States, and out-of-date discharge information. For purposes of this assessment, the number of sources that potentially cause water quality criteria problems is assumed to be three times the number actually listed; in other words, the number of POTWs subject to additional controls is conservatively estimated to be triple the 46 actually identified, or 138 POTWs.

As mentioned, there are various alternatives that an individual POTW might undertake to comply with more stringent permit requirements. While the most costly alternatives involve additional pollution control equipment to the POTW, there are other mechanisms to improve the quality of the POTW's effluent. For example, a pretreatment program could require an industrial discharger to reduce or eliminate its contribution of toxic pollutants to the POTW's wastestream. Alternatively, nonpoint sources could

undertake better management practices to reduce runoff. Many of these alternatives have little or no incremental cost impact to the POTW. While some of the alternatives involve a shift in costs, the overall effect is likely to be a lower cost than if incurred solely by the POTW. Even with the availability of alternatives for compliance, this assessment assumes that half of the POTWs will install additional treatment. Hence, 50 percent, or 69, of the potentially affected POTWs are assumed to incur additional compliance costs.

The costs of additional pollution controls are derived from the two sources mentioned above. The cost calculations for activated carbon include capital costs, O&M costs, source controls, and studies (such as mixing zone demonstrations, toxicity testing, monitoring, and fish bio-uptake tests). For purposes of this assessment, simplifying assumptions were then applied to those cost calculations to estimate total annual costs for various sizes of POTWs. The incremental total annual costs for activated carbon are estimated to be \$0.4 million for a small POTW, \$1.4 million for a medium POTW, and \$12.8 million for a large POTW. The cost estimates for improved secondary treatment by polymer addition include annualized capital costs and O&M expenses. The incremental total annual costs for this technology are estimated to be less than \$0.1 million for a small POTW, \$0.4 million for a medium POTW, and \$1.5 million for a large POTW.

Based on engineering judgment, 75 percent of the POTWs are assumed to rely on chemical addition to meet permit limits. The remaining 25 percent are assumed to rely on activated carbon adsorption. To estimate costs for each group of POTWs, the facilities are categorized according to flow groups, assuming that the size distribution of the POTWs in the affected States is the same as those used in each cost source. Then, the incremental costs for each type of treatment are applied to the number of POTWs in each size category. This procedure results in an incremental cost estimate of approximately \$30 million.

To summarize, some POTWs may be subject to additional treatment requirements as a result of this rule. The number of POTWs and the types of treatment are dependent on many site-specific conditions and on the pollutants included in today's rule. For many of the POTWs that are major dischargers in the States that will need to adopt new water quality standards, there is likely to be no incremental cost.

Using a conservative estimate of the remaining POTWs, the upper bound of an incremental cost estimate is approximately \$30 million for POTWs to comply with new discharge permit requirements.

9. Conclusions of EPA's Cost Assessment

Today's rule establishes a legal minimum standard where States have failed to comply with the statutory mandate to adopt numeric criteria for toxic pollutants. The impacts to dischargers are difficult to estimate because of the numerous assumptions and unknowns. While the Agency acknowledges that some dischargers may incur compliance costs due to new water quality standards, a meaningful cost estimate that covers the entire rule is not feasible.

In the absence of a cost estimate, *per se*, the Agency has described the types of costs that may be incurred by various types of dischargers. In addition, this cost assessment includes four examples of potential compliance cost scenarios: reducing dioxin discharges from pulp mills, reducing copper discharges for metal finishing, controlling priority pollutant discharges for organic chemical manufacturing, and reducing discharges from POTWs.

EPA finds that the costs to comply with toxic pollutant criteria may be less than anticipated at the time the rule was proposed. Many States have adopted their own numeric criteria and are therefore excluded from today's rulemaking. In addition, for some point source categories, where technology-based controls have been established, more stringent water quality-based controls will result in no incremental compliance costs. Further, EPA concludes that additional analysis is not warranted because the uncertainty of such an analyses would not provide enough reliable information to assist decision-makers in evaluating the regulatory strategy for this statutorily-mandated rule.

10. Introduction to Benefits Assessment

The numeric criteria for toxic pollutants promulgated in today's rule are essential in implementing toxics controls and protecting human health and aquatic ecosystems. Under this Rule, a total of 15 States and Territories will receive criteria for human health and aquatic life (14 for human health and 13 for aquatic life). The adopted standards will result in decreased toxic pollutant loading discharges which will result in improved protection of human health and aquatic life.

The Agency did not include a quantitative estimate of the benefits in the proposed rule for reasons similar to those cited above for not including a detailed cost estimate. The environmental benefits associated with this promulgation are difficult to assess and quantify. A comprehensive analysis of human health and ecological benefits is not practical given the available resources and inherent limitations such as (1) assuming a linear relationship between pollutant loading reductions and benefits attributed to the clean-up of surface waters; (2) underestimating the benefits or reducing toxics due to the complexity of assessing impacts on aquatic ecosystems; and (3) the uncertainty in estimating the magnitude of intermedia transfers of pollutants. Such uncertainties limit the value of using such estimates to evaluate the net benefits of this rule. However, the Agency has undertaken a preliminary assessment of potential human health and ecological benefits that might be accrued through promulgation of the rule.

11. Human Health Assessment Scope

The potential benefits to human health of establishing toxic criteria include: (1) Reducing the potential health risks to persons eating fish contaminated with toxic pollutants, (2) reducing the potential health risks to persons drinking contaminated drinking water, and (3) reducing the potential health risks to swimmers from dermal exposure to contaminated surface waters. EPA's qualitative assessment is limited to assessing (1) potential benefits from reducing pollutant levels in fish that may be caught by sport and subsistence fishermen and subsequently consumed by them and their families; and (2) potential benefits that may also result from lowering pollutant levels in commercially caught fish consumed by the general population. This assessment is limited to assessing only the potential reduction in cancer risk; no attempt has been made to assess potential reductions in risks due to reproductive, developmental, or other chronic and subchronic toxic effects.

12. Ecological Assessment Scope

Some of the ecological benefits are difficult to assess due to the complexity of ecological interactions, the limited amount of ecological risk information available, and the lack of an established methodology for evaluating ecological benefits. In addition, difficulties arise in estimating the exposure of aquatic ecosystems due to the large size of ecosystems, wide geographical distribution, heterogeneous

characteristics and the wide range of populations with differing sensitivities to impacts. While the benefits of promulgating this rule were not quantified due to such uncertainties and limitations, the potential benefits of establishing toxic criteria for the protection of aquatic life can be described qualitatively.

The most recent National Water Quality Inventory indicates that one-third of monitored river miles, lake acres, and coastal waters have elevated levels of toxic pollutants. After evaluating these data, the Agency concluded that the data most likely understate the presence or discharge of toxic pollutants because of the limited amount of monitoring data for some States and inconsistencies among the States in how the data were generated. Thus, it is likely that significant portions of water bodies in some States exceed water quality criteria for the protection of aquatic life. These criteria were developed to protect most aquatic organisms, as well as wildlife that consume aquatic organisms, from acute and chronic toxic effects that adversely affect survival, growth or reproduction. These effects will vary due to the diversity of species with differing sensitivities to impacts. For example, lead exposure can cause spinal deformities in rainbow trout. Nickel exposure can affect spawning behavior of shrimp. Nickel, mercury, and copper exposure can affect the growth activity of algae. In addition, copper, mercury, and cadmium can be acutely toxic to aquatic life including finfish. These types of ecological effects are expected to be reduced because this rule should reduce ambient pollutant levels. In addition, this rule will reduce continuous discharges of toxics which will allow for a natural recovery of the ecosystems.

13. Qualitative Benefits Assessment

Human health benefits that can be attributed to this rule are expressed in terms of the reduction in cancer risk. The analysis performed was limited to assessing only the potential reduction in cancer risk; no assessment of potential reductions in risks due to reproductive, developmental, or other chronic and subchronic toxic effects was conducted. However, given the number of pollutants, there could be: (1) Decreased incidence of systemic toxicity to vital organs such as liver and kidney; (2) decreased extent of learning disability and intellectual impairment due to the exposure to such pollutants as lead; and (3) decreased risk of adverse reproductive effects and genotoxicity.

The ecological benefits that can be expected from today's rule include protection of both fresh and salt water organisms, as well as wildlife that consume aquatic organisms. Today's rule will result in a reduction in the presence and discharge of toxic pollutants in the water bodies of these States thereby protecting those aquatic ecosystems currently under stress, providing the opportunity for the reestablishment of productive ecosystems in damaged water bodies, and protection of resident endangered species.

In addition, the rule would result in the propagation and productivity of fish and other organisms, maintaining fisheries for both commercial and recreational purposes. Recreational activities such as boating, water skiing, and swimming would also be preserved along with the maintenance of an aesthetically pleasing environment. Both recreational and commercial activities contribute, in turn, to the support of local and State economies.

K. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq., Pub. L. 96-354) requires EPA to assess whether its regulations create a disproportionate effect on small entities. Among its provisions, the Act directs EPA to prepare and publish an initial regulatory flexibility analysis at the time a rule is proposed if the rule will have a significant impact on a substantial number of small entities. In the preamble to the proposed rule, EPA discussed the possibility that the rule could result in treatment costs to some dischargers to comply with water quality standards that incorporate new criteria for toxic pollutants. The Agency did not conclude, however, that the rule would have a significant impact on a substantial number of small entities due to the uncertainties associated with estimating total costs and impacts. The difficulties of cost estimation for specific groups of dischargers (such as small businesses or governments) were described in the preamble section that outlined EPA's response to Executive Order 12291. Similarly, in today's final rulemaking, the details of EPA's findings concerning the costs and impacts of this rule are presented in section J, above.

Briefly, the complexities and difficulties associated with estimating costs for purposes of economic or regulatory analysis similarly apply to estimating impacts to small entities. For purposes of this rulemaking, small entities are small dischargers, whether industrial or municipal. Regardless of

the parameters used to define small dischargers (for example, discharge flow, number of employees, population served), EPA's expression of costs and impacts for this rulemaking is limited to the descriptions in section J. EPA does not find that there will be a significant impact on a substantial number of small entities because impacts on specific dischargers cannot be predicted with certainty, and based on several examples in the cost assessment, it appears that potential impacts will not be concentrated among small dischargers.

In addition, EPA again finds that the impacts on small entities are best considered during standards development and implementation when site-specific costs can be estimated, and any resulting impacts can be minimized or alleviated as part of writing the discharge permit. It is not the Agency's intent to ignore the consequences of incorporating toxic pollutant criteria, but instead, that these consequences are more appropriately defined and accounted for in the permit-writing context. The water quality standards regulation provides several means (such as adjusting designated uses, setting site-specific criteria, or granting variances) to consider costs and adjust standards to account for the impacts on small dischargers.

While the imposition of EPA's numeric criteria for toxic pollutants may limit the flexibility that States will have to use these procedures to modify standards, EPA's expectation is that impacts will not be concentrated on small dischargers. Although there can be site-specific cases of water quality violations due to toxic discharges from low-flow point sources, EPA generally finds that priorities for NPDES permits focus on major dischargers. Small entities are less likely to be included in this group.

Other requirements of the Regulatory Flexibility Act are fulfilled in other sections of this preamble. Specifically,

the Agency's explanation for taking this action and the legal basis for the rule are found in section E. The number of small entities that will be affected by the rule is not estimated for the reasons expressed above. The projected reporting and recordkeeping requirements are discussed in Section L. There is no anticipated duplication, overlap, or conflict with other Federal rules, except to the extent that technology-based standards (such as BAT) are sufficient to also meet water quality standards. Alternatives to the final rule include any of the opportunities that States had to adopt their own standards, incorporating any of the procedures to limit the compliance burden; these alternatives are discussed in Sections B and C.

The Agency concludes that this rulemaking, *per se*, will not result in a significant impact on a substantial number of small entities, and a final regulatory flexibility analysis is not required.

L. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* These requirements will not be effective until OMB approves them and a technical amendment to that effect is published in the *Federal Register*. An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 0988.04) and a copy may be obtained from Sandy Farmer, Information Policy Branch; EPA; 401 M St., SW. (PM-223Y); Washington, DC 20460 or by calling (202) 260-2740.

Public reporting burden for this collection of information is estimated to average 725 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the

data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223Y, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs; Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." Comments must be submitted by January 21, 1993.

List of Subjects in 40 CFR Part 131

Water pollution control, Water quality standards, Toxic pollutants.

Dated: December 1, 1992.

William K. Reilly,
Administrator.

For the reasons set out in the preamble title 40, chapter I, part 131 of the Code of Federal Regulations is amended as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—[Amended]

2. Section 131.36 is added to subpart D to read as follows:

§ 131.36 Toxic criteria for those states not complying with Clean Water Act section 303(c)(2)(B).

(a) *Scope.* This section is not a general promulgation of the section 304(a) criteria for priority toxic pollutants but is restricted to specific pollutants in specific States.

(b)(1) *EPA's Section 304(a) Criteria for Priority Toxic Pollutants.*

BILLING CODE 6560-60-M

A (#) COMPOUND	CAS Number	B FRESHWATER		C SALTWATER		D HUMAN HEALTH (10 ⁻⁶ risk for carcinogens)	
		Criterion Maximum Conc. d (ug/L) B1	Criterion Continuous Conc. d (ug/L) B2	Criterion Maximum Conc. d (ug/L) C1	Criterion Continuous Conc. d (ug/L) C2	For Consumption of: Water & Organisms Only	
						D1 (ug/L)	D2 (ug/L)
1 Antimony	7440360					14 a	4300 a
2 Arsenic	7440382	360 m	190 m	69 m	36 m	0.018 a,b,c	0.14 a,b,c
3 Beryllium	7440417					n	n
4 Cadmium	7440439	3.9 e,m	1.1 e,m	43 m	9.3 m	n	n
5a Chromium (III)	16065831	1700 e,m	210 e,m			n	n
b Chromium (VI)	18540299	16 m	11 m	1100 m	50 m	n	n
6 Copper	7440508	18 e,m	12 e,m	2.9 m	2.9 m		
7 Lead	7439921	82 e,m	3.2 e,m	220 m	8.5 m	n	n
8 Mercury	7439976	2.4 m	0.012 i	2.1 m	0.025 i	0.14	0.15
9 Nickel	7440020	1400 e,m	160 e,m	75 m	8.3 m	610 a	1600 a
10 Selenium	7782492	20	5	300 m	71 m	n	n
Silver	7440224	4.1 e,m		2.3 m			
12 Thallium	7440280					1.7 a	6.3 a
13 Zinc	7440666	120 e,m	110 e,m	95 m	86 m		
14 Cyanide	57125	22	5.2	1	1	700 a	220000 a,j
15 Asbestos	1332214					7,000,000 fibers/L	k
16 2,3,7,8-TCDD (Dioxin)	1746016					0.00000013 c	0.00000014 c
17 Acrolein	107028					320	780
18 Acrylonitrile	107131					0.059 a,c	0.66 a,c
19 Benzene	71432					1.2 a,c	71 a,c
20 Bromoform	75252					4.3 a,c	360 a,c
21 Carbon Tetrachloride	56235					0.25 a,c	4.4 a,c
22 Chlorobenzene	108907					680 a	21000 a,j
23 Chlorodibromomethane	124481					0.41 a,c	34 a,c
24 Chloroethane	75003						
25 2-Chloroethylvinyl Ether	110758						
26 Chloroform	67663					5.7 a,c	470 a,c
27 Dichlorobromomethane	75274					0.27 a,c	22 a,c

#	COMPOUND	CAS Number	B		C		D	
			FRESHWATER		SALTWATER		HUMAN HEALTH (10 ⁻⁶ risk for carcinogens)	
			Criterion Maximum Conc. d (ug/L)	Criterion Continuous Conc. d (ug/L)	Criterion Maximum Conc. d (ug/L)	Criterion Continuous Conc. d (ug/L)	For Consumption of: Water & Organisms Only	
			B1	B2	C1	C2	D1 (ug/L)	D2 (ug/L)
28	1,1-Dichloroethane	75343						
29	1,2-Dichloroethane	107062					0.38 a,c	99 a,c
30	1,1-Dichloroethylene	75354					0.057 a,c	3.2 a,c
31	1,2-Dichloropropane	78875						
32	1,3-Dichloropropylene	542756					10 a	1700 a
33	Ethylbenzene	100414					3100 a	29000 a
34	Methyl Bromide	74839					48 a	4000 a
35	Methyl Chloride	74873					n	n
36	Methylene Chloride	75092					4.7 a,c	1600 a,c
37	1,1,2,2-Tetrachloroethane	79345					0.17 a,c	11 a,c
38	Tetrachloroethylene	127184					0.8 c	8.85 c
39	Toluene	108883					6800 a	200000 a
40	1,2-Trans-Dichloroethylene	156605						
41	1,1,1-Trichloroethane	71556					n	n
42	1,1,2-Trichloroethane	79005					0.60 a,c	42 a,c
43	Trichloroethylene	79016					2.7 c	81 c
44	Vinyl Chloride	75014					2 c	525 c
45	2-Chlorophenol	95578						
46	2,4-Dichlorophenol	120832					93 a	790 a, j
47	2,4-Dimethylphenol	105679						
48	2-Methyl-4,6-Dinitrophenol	534521					13.4	765
49	2,4-Dinitrophenol	51285					70 a	14000 a
50	2-Nitrophenol	88755						
51	4-Nitrophenol	100027						
52	3-Methyl-4-Chlorophenol	59507						
53	Pentachlorophenol	87865	20 f	13 f	13	7.9	0.28 a,c	8.2 a,c, j
54	Phenol	108952					21000 a	4600000 a, j
55	2,4,6-Trichlorophenol	88062					2.1 a,c	6.5 a,c
56	Acenaphthene	83329						

A		B		C		D	
#) COMPOUND	CAS Number	FRESHWATER		SALTWATER		HUMAN HEALTH (10 ⁻⁶ risk for carcinogens)	
		Criterion Maximum Conc. d (ug/L) B1	Criterion Continuous Conc. d (ug/L) B2	Criterion Maximum Conc. d (ug/L) C1	Criterion Continuous Conc. d (ug/L) C2	For Consumption of: Water & Organisms (ug/L) D1	Organisms Only (ug/L) D2
57	Acenaphthylene	208968					
58	Anthracene	120127				9600 a	110000 a
59	Benzidine	92875				0.00012 a,c	0.00054 a,c
60	Benzo(a)Anthracene	56553				0.0028 c	0.031 c
61	Benzo(a)Pyrene	50328				0.0028 c	0.031 c
62	Benzo(b)Fluoranthene	205992				0.0028 c	0.031 c
63	Benzo(ghi)Perylene	191242					
64	Benzo(k)Fluoranthene	207089				0.0028 c	0.031 c
65	Bis(2-Chloroethoxy)Methane	111911					
66	Bis(2-Chloroethyl)Ether	111444				0.031 a,c	1.4 a,c
67	Bis(2-Chloroisopropyl)Ether	108601				1400 a	170000 a
68	Bis(2-Ethylhexyl)Phthalate	117817				1.8 a,c	5.9 a,c
69	4-Bromophenyl Phenyl Ether	101553					
70	Butylbenzyl Phthalate	85687					
71	2-Chloronaphthalene	91587					
72	4-Chlorophenyl Phenyl Ether	7005723					
73	Chrysene	218019				0.0028 c	0.031 c
74	Dibenzo(a,h)Anthracene	53703				0.0028 c	0.031 c
75	1,2-Dichlorobenzene	95501				2700 a	17000 a
76	1,3-Dichlorobenzene	541731				400	2600
77	1,4-Dichlorobenzene	106467				400	2600
78	3,3'-Dichlorobenzidine	91941				0.04 a,c	0.077 a,c
79	Diethyl Phthalate	84662				23000 a	120000 a
80	Dimethyl Phthalate	131113				313000	2900000
81	Di-n-Butyl Phthalate	84742				2700 a	12000 a
82	2,4-Dinitrotoluene	121142				0.11 c	9.1 c
83	2,6-Dinitrotoluene	606202					
84	Di-n-Octyl Phthalate	117840					
85	1,2-Diphenylhydrazine	122667				0.040 a,c	0.54 a,c

A (#) COMPOUND	CAS. Number	B FRESHWATER		C SALTWATER		D HUMAN HEALTH (10 ⁻⁶ risk for carcinogens)		
		Criterion Maximum Conc. d (ug/L) B1	Criterion Continuous Conc. d (ug/L) B2	Criterion Maximum Conc. d (ug/L) C1	Criterion Continuous Conc. d (ug/L) C2	For Consumption of: Water & Organisms Only		
						D1 (ug/L)	D2 (ug/L)	
86	Fluoranthene	206440				300 a	370 a	
87	Fluorene	86737				1300 a	14000 a	
88	Hexachlorobenzene	118741				0.00075 a,c	0.00077 a,c	
89	Hexachlorobutadiene	87683				0.44 a,c	50 a,c	
90	Hexachlorocyclopentadiene	77474				240 a	17000 a,j	
91	Hexachloroethane	67721				1.9 a,c	8.9 a,c	
92	Indeno(1,2,3-cd)Pyrene	193395				0.0028 c	0.031 c	
93	Isophorone	78591				8.4 a,c	600 a,c	
94	Naphthalene	91203						
95	Nitrobenzene	98953				17 a	1900 a,j	
96	N-Nitrosodimethylamine	62759				0.00069 a,c	8.1 a,c	
97	N-Nitrosodi-n-Propylamine	621647						
98	N-Nitrosodiphenylamine	86306				5.0 a,c	16 a,c	
99	Phenanthrene	85018						
100	Pyrene	129000				960 a	11000 a	
101	1,2,4-Trichlorobenzene	120821						
102	Aldrin	309002	3 g		1.3 g	0.00013 a,c	0.00014 a,c	
103	alpha-BHC	319846				0.0039 a,c	0.013 a,c	
104	beta-BHC	319857				0.014 a,c	0.046 a,c	
105	gamma-BHC	58899	2 g	0.08 g	0.16 g	0.019 c	0.063 c	
106	delta-BHC	319868						
107	Chlordane	57749	2.4 g	0.0043 g	0.09 g	0.00057 a,c	0.00059 a,c	
108	4,4'-DDT	50293	1.1 g	0.001 g	0.13 g	0.00059 a,c	0.00059 a,c	
109	4,4'-DDE	72559				0.00059 a,c	0.00059 a,c	
110	4,4'-DDD	72548				0.00083 a,c	0.00084 a,c	
111	Dieldrin	60571	2.5 g	0.0019 g	0.71 g	0.00014 a,c	0.00014 a,c	
112	alpha-Endosulfan	959988	0.22 g	0.056 g	0.034 g	0.0087 g	0.93 a	2.0 a
113	beta-Endosulfan	33213659	0.22 g	0.056 g	0.034 g	0.0087 g	0.93 a	2.0 a

A		B		C		D		
		FRESHWATER		SALTWATER		HUMAN HEALTH (10 ⁻⁶ risk for carcinogens)		
(#)	COMPOUND	CAS Number	Criterion	Criterion	Criterion	Criterion	For Consumption of: Water & Organisms Only (ug/L) D1	Organisms Only (ug/L) D2
			Maximum Conc. d (ug/L) B1	Continuous Conc. d (ug/L) B2	Maximum Conc. d (ug/L) C1	Continuous Conc. d (ug/L) C2		
114	Endosulfan Sulfate	1031078					0.93 a	2.0 a
115	Endrin	72208	0.18 g	0.0023 g	0.037 g	0.0023 g	0.76 a	0.81 a,j
116	Endrin Aldehyde	7421934					0.76 a	0.81 a,j
117	Heptachlor	76448	0.52 g	0.0038 g	0.053 g	0.0036 g	0.00021 a,c	0.00021 a,c
118	Heptachlor Epoxide	1024573	0.52 g	0.0038 g	0.053 g	0.0036 g	0.00010 a,c	0.00011 a,c
119	PCB-1242	53469219		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
120	PCB-1254	11097691		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
121	PCB-1221	11104282		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
122	PCB-1232	11141165		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
123	PCB-1248	12672296		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
124	PCB-1260	11096826		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
125	PCB-1016	12674112		0.014 g		0.03 g	0.000044 a,c	0.000045 a,c
126	Toxaphene	8001352	0.73	0.0002	0.21	0.0002	0.00073 a,c	0.00075 a,c
Total No. of Criteria (h) =			24	29	23	27	91	90

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Footnotes:

a. Criteria revised to reflect current agency q_1^* or RfD, as contained in the Integrated Risk Information System (IRIS). The fish tissue bioconcentration factor (BCF) from the 1980 criteria documents was retained in all cases.

b. The criteria refers to the inorganic form only.

c. Criteria in the matrix based on carcinogenicity (10^{-6} risk). For a risk level of 10^{-5} , move the decimal point in the matrix value one place to the right.

d. Criteria Maximum Concentration (CMC) = the highest concentration of a pollutant to which aquatic life can be exposed for a short period of time (1-hour average) without deleterious effects. Criteria Continuous Concentration (CCC) = the highest

concentration of a pollutant to which aquatic life can be exposed for an extended period of time (4 days) without deleterious effects. $\mu\text{g/L}$ = micrograms per liter

e. Freshwater aquatic life criteria for these metals are expressed as a function of total hardness (mg/L), and as a function of the pollutant's water effect ratio, WER, as defined in § 131.36(c). The equations are provided in matrix at § 131.36(b)(2). Values displayed above in the matrix correspond to a total hardness of 100 mg/L and a water effect ratio of 1.0.

f. Freshwater aquatic life criteria for pentachlorophenol are expressed as a function of pH, and are calculated as follows. Values displayed above in the matrix correspond to a pH of 7.8.

$$\text{CMC} = \exp(1.005(\text{pH}) - 4.830) \quad \text{CCC} = \exp(1.005(\text{pH}) - 5.290)$$

g. Aquatic life criteria for these compounds were issued in 1980 utilizing the 1980

Guidelines for criteria development. The acute values shown are final acute values (FAV) which by the 1980 Guidelines are instantaneous values as contrasted with a CMC which is a one-hour average.

h. These totals simply sum the criteria in each column. For aquatic life, there are 30 priority toxic pollutants with some type of freshwater or saltwater, acute or chronic criteria. For human health, there are 91 priority toxic pollutants with either "water + fish" or "fish only" criteria. Note that these totals count chromium as one pollutant even though EPA has developed criteria based on two valence states. In the matrix, EPA has assigned numbers 5a and 5b to the criteria for chromium to reflect the fact that the list of 126 priority toxic pollutants includes only a single listing for chromium.

i. If the CCC for total mercury exceeds 0.012 $\mu\text{g/L}$ more than once in a 3-year period in the ambient water, the edible portion of aquatic species of concern must be analyzed to determine whether the concentration of methyl mercury exceeds the FDA action level (1.0 mg/kg). If the FDA action level is exceeded, the State must notify the appropriate EPA Regional Administrator, initiate a revision of its mercury criterion in its water quality standards so as to protect designated uses, and take other appropriate action such as issuance of a fish consumption advisory for the affected area.

j. No criteria for protection of human health from consumption of aquatic organisms (excluding water) was presented in the 1980 criteria document or in the 1986 Quality Criteria for Water. Nevertheless, sufficient information was presented in the 1980 document to allow a calculation of a criterion, even though the results of such a calculation were not shown in the document.

k. The criterion for asbestos is the MCL (56 FR 3526, January 30, 1991).

l. This letter not used as a footnote.

m. Criteria for these metals are expressed as a function of the water effect ratio, WER, as defined in 40 CFR 131.36(c).

$$\text{CMC} = \text{column B1 or C1 value} \times \text{WER}$$

$$\text{CCC} = \text{column B2 or C2 value} \times \text{WER}$$

n. EPA is not promulgating human health criteria for this contaminant. However, permit authorities should address this contaminant in NPDES permit actions using the State's existing narrative criteria for toxics.

General Notes:

1. This chart lists all of EPA's priority toxic pollutants whether or not criteria recommendations are available. Blank spaces indicate the absence of criteria recommendations. Because of variations in chemical nomenclature systems, this listing of toxic pollutants does not duplicate the listing in Appendix A of 40 CFR Part 423. EPA has added the Chemical Abstracts Service (CAS) registry numbers, which provide a unique identification for each chemical.

2. The following chemicals have organoleptic based criteria recommendations that are not included on this chart (for reasons which are discussed in the preamble): copper, zinc, chlorobenzene, 2-chlorophenol, 2,4-dichlorophenol, acenaphthene, 2,4-dimethylphenol, 3-methyl-4-chlorophenol, hexachlorocyclopentadiene, pentachlorophenol, phenol

3. For purposes of this rulemaking, freshwater criteria and saltwater criteria apply as specified in 40 CFR 131.36(c).

(2) Factors for Calculating Metals Criteria

$$\text{CMC} = \text{WER} \exp\{m_A[\ln(\text{hardness})] + b_A\} \quad \text{CCC} = \text{WER} \exp\{m_C[\ln(\text{hardness})] + b_C\}$$

	m_A	b_A	m_C	b_C
Cadmium	1.128	-3.828	0.7852	-3.490
Copper	0.9422	-1.464	0.8545	-1.465
Chromium (III)	0.8190	3.688	0.8190	1.581
Lead	1.273	-1.460	1.273	-4.705
Nickel	0.8460	3.3612	0.8460	1.1645
Silver	1.72	-6.52
Zinc	0.8473	0.8604	0.8473	0.7614

Note: The term "exp" represents the base e exponential function.

(c) **Applicability.** (1) The criteria in paragraph (b) of this section apply to the States' designated uses cited in paragraph (d) of this section and supersede any criteria adopted by the State, except when State regulations contain criteria which are more stringent for a particular use in which case the State's criteria will continue to apply.

(2) The criteria established in this section are subject to the State's general rules of applicability in the same way and to the same extent as are the other numeric toxics criteria when applied to the same use classifications including

mixing zones, and low flow values below which numeric standards can be exceeded in flowing fresh waters.

(i) For all waters with mixing zone regulations or implementation procedures, the criteria apply at the appropriate locations within or at the boundary of the mixing zones; otherwise the criteria apply throughout the waterbody including at the end of any discharge pipe, canal or other discharge point.

(ii) A State shall not use a low flow value below which numeric standards can be exceeded that is less stringent than the following for waters suitable

for the establishment of low flow return frequencies (i.e., streams and rivers):

Aquatic Life

Acute criteria (CMC) 1 Q 10 or 1 B 3
Chronic criteria (CCC) 7 Q 10 or 4 B 3

Human Health

Non-carcinogens 30 Q 5
Carcinogens Harmonic mean-flow

Where:

CMC—criteria maximum concentration—the water quality criteria to protect against acute effects in aquatic life and is the highest instream concentration of a priority toxic pollutant consisting of a one-hour average

not to be exceeded more than once every three years on the average;

CCC—criteria continuous concentration—the water quality criteria to protect against chronic effects in aquatic life is the highest instream concentration of a priority toxic pollutant consisting of a 4-day average not to be exceeded more than once every three years on the average;

1 Q 10 is the lowest one day flow with an average recurrence frequency of once in 10 years determined hydrologically;

1 B 3 is biologically based and indicates an allowable exceedence of once every 3 years. It is determined by EPA's computerized method (DFLOW model);

7 Q 10 is the lowest average 7 consecutive day low flow with an average recurrence frequency of once in 10 years determined hydrologically;

4 B 3 is biologically based and indicates an allowable exceedence for 4 consecutive days once every 3 years. It is determined by EPA's computerized method (DFLOW model);

30 Q 5 is the lowest average 30 consecutive day low flow with an average recurrence frequency of once in 5 years determined hydrologically; and the harmonic mean flow is a long term mean flow value calculated by dividing the number of daily flows analyzed by the sum of the reciprocals of those daily flows.

(iii) If a State does not have such a low flow value for numeric standards compliance, then none shall apply and the criteria included in paragraph (d) of this section herein apply at all flows.

(3) The aquatic life criteria in the matrix in paragraph (b) of this section apply as follows:

(i) For waters in which the salinity is equal to or less than 1 part per thousand 95% or more of the time, the applicable criteria are the freshwater criteria in Column B;

(ii) For waters in which the salinity is equal to or greater than 10 parts per thousand 95% or more of the time, the applicable criteria are the saltwater criteria in Column C; and

(iii) For waters in which the salinity is between 1 and 10 parts per thousand as defined in paragraphs (c)(3) (i) and (ii) of this section, the applicable criteria are the more stringent of the freshwater or saltwater criteria. However, the Regional Administrator may approve the use of the alternative freshwater or saltwater criteria if scientifically defensible information and data demonstrate that on a site-specific basis the biology of the waterbody is dominated by freshwater aquatic life and that freshwater criteria are more appropriate; or conversely, the biology of the waterbody is dominated by saltwater aquatic life and that saltwater criteria are more appropriate.

(4) *Application of metals criteria.* (i) For purposes of calculating freshwater aquatic life criteria for metals from the

equations in paragraph (b)(2) of this section, the minimum hardness allowed for use in those equations shall not be less than 25 mg/l, as calcium carbonate, even if the actual ambient hardness is less than 25 mg/l as calcium carbonate. The maximum hardness value for use in those equations shall not exceed 400 mg/l as calcium carbonate, even if the actual ambient hardness is greater than 400 mg/l as calcium carbonate. The same provisions apply for calculating the metals criteria for the comparisons provided for in paragraph (c)(3)(iii) of this section.

(ii) The hardness values used shall be consistent with the design discharge conditions established in paragraph (c)(2) of this section for flows and mixing zones.

(iii) The criteria for metals (compounds #1-#13 in paragraph (b) of this section) are expressed as total recoverable. For purposes of calculating aquatic life criteria for metals from the equations in footnote M. in the criteria matrix in paragraph (b)(1) of this section and the equations in paragraph (b)(2) of this section, the water-effect ratio is computed as a specific pollutant's acute or chronic toxicity values measured in water from the site covered by the standard, divided by the respective acute or chronic toxicity value in laboratory dilution water. The water-effect ratio shall be assigned a value of 1.0, except where the permitting authority assigns a different value that protects the designated uses of the water body from the toxic effects of the pollutant, and is derived from suitable tests on sampled water representative of conditions in the affected water body, consistent with the design discharge conditions established in paragraph (c)(2) of this section. For purposes of this paragraph, the term acute toxicity value is the toxicity test results, such as the lethal concentration of one-half of the test organisms (i.e., LC50) after 96 hours of exposure (e.g., fish toxicity tests) or the effect concentration to one-half of the test organisms, (i.e., EC50) after 48 hours of exposure (e.g., daphnia toxicity tests). For purposes of this paragraph, the term chronic value is the result from appropriate hypothesis testing or regression analysis of measurements of growth, reproduction, or survival from life cycle, partial life cycle, or early life stage tests. The determination of acute and chronic values shall be according to current standard protocols (e.g., those published by the American Society for Testing Materials (ASTM)) or other comparable methods. For calculation of criteria using site-specific values for both the hardness and the water effect ratio, the

hardness used in the equations in paragraph (b)(2) of this section shall be as required in paragraph (c)(4)(ii) of this section. Water hardness shall be calculated from the measured calcium and magnesium ions present, and the ratio of calcium to magnesium shall be approximately the same in standard laboratory toxicity testing water as in the site water.

(d) *Criteria for Specific Jurisdictions—*
(1) *Rhode Island, EPA Region 1.* (i) All waters assigned to the following use classifications in the Water Quality Regulations for Water Pollution Control adopted under Chapters 46-12, 42-17.1, and 42-35 of the General Laws of Rhode Island are subject to the criteria in paragraph (d)(1)(ii) of this section, without exception:

6.21 Freshwater	6.22 Saltwater:
Class A	Class SA
Class B	Class SB
Class C	Class SC

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(1)(i) of this section:

Use classification	Applicable criteria
Class A	
Class B waters where water supply use is designated	These classifications are assigned the criteria in: Column D1—all
Class B waters where water supply use is not designated;	
Class C;	
Class SA;	
Class SB;	
Class SC	Each of these classifications is assigned the criteria in: Column D2—all

(iii) The human health criteria shall be applied at the 10⁻⁵ risk level, consistent with the State policy. To determine appropriate value for carcinogens, see footnote c in the criteria matrix in paragraph (b)(1) of this section.

(2) *Vermont, EPA Region 1.* (i) All waters assigned to the following use classifications in the Vermont Water Quality Standards adopted under the authority of the Vermont Water Pollution Control Act (10 V.S.A., Chapter 47) are subject to the criteria in paragraph (d)(2)(ii) of this section, without exception:

Class A
Class B
Class C

(ii) The following criteria from the matrix in paragraph (b)(1) of this section

apply to the use classifications identified in paragraph (d)(2)(i) of this section:

Use classification	Applicable criteria
Class A	
Class B waters where water supply use is designated	This classification is assigned the criteria in: Column B1—all Column B2—all Column D1—all
Class B waters where water supply use is not designated	
Class C	These classifications are assigned the criteria in: Column B1—all Column B2—all Column D2—all

(iii) The human health criteria shall be applied at the State-proposed 10⁻⁶ risk level.

(3) *New Jersey, EPA Region 2.* (i) All waters assigned to the following use classifications in the New Jersey Administrative Code (N.J.A.C.) 7:9-4.1 et seq., Surface Water Quality Standards, are subject to the criteria in paragraph (d)(3)(ii) of this section, without exception.

- N.J.A.C. 7:9-4.12(b): Class PL
- N.J.A.C. 7:9-4.12(c): Class FW2
- N.J.A.C. 7:9-4.12(d): Class SE1
- N.J.A.C. 7:9-4.12(e): Class SE2
- N.J.A.C. 7:9-4.12(f): Class SE3
- N.J.A.C. 7:9-4.12(g): Class SC
- N.J.A.C. 7:9-4.13(a): Delaware River Zones 1C, 1D, and 1E
- N.J.A.C. 7:9-4.13(b): Delaware River Zone 2
- N.J.A.C. 7:9-4.13(c): Delaware River Zone 3
- N.J.A.C. 7:9-4.13(d): Delaware River Zone 4
- N.J.A.C. 7:9-4.13(e): Delaware River Zone 5
- N.J.A.C. 7:9-4.13(f): Delaware River Zone 6

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(3)(i) of this section:

Use classification	Applicable criteria
PL (Freshwater Pinelands), FW2	These classifications are assigned the criteria in: Column B1—all except #102, 105, 107, 108, 111, 112, 113, 115, 117, and 118. Column B2—all except #105, 107, 108, 111, 112, 113, 115, 117, 118, 119, 120, 121, 122, 123, 124, and 125.

Use classification	Applicable criteria	Use classification	Applicable criteria
	Column D1—all at a 10 ⁻⁶ risk level except #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105; #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105, at a 10 ⁻⁵ risk level. Column D2—all at a 10 ⁻⁶ risk level except #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105; #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105, at a 10 ⁻⁵ risk level.	Delaware River zones 3, 4, and 5, and Delaware Bay zone 6	These classifications are each assigned the criteria in: Column C1—all. Column C2—all. Column D2—all at a 10 ⁻⁶ risk level except #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105; #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105, at a 10 ⁻⁵ risk level.

PL (Saline Water Pinelands), SE1, SE2, SE3, SC

These classifications are each assigned the criteria in:

- Column C1—all except #102, 105, 107, 108, 111, 112, 113, 115, 117, and 118.
- Column C2—all except #105, 107, 108, 111, 112, 113, 115, 117, 118, 119, 120, 121, 122, 123, 124, and 125.

- Column D2—all at a 10⁻⁶ risk level except #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105; #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105, at a 10⁻⁵ risk level.

Delaware River zones 1C, 1D, 1E, 2, 3, 4, 5 and Delaware Bay zone 6

These classifications are each assigned the criteria in:

- Column B1—all.
- Column B2—all.
- Column D1—all at a 10⁻⁶ risk level except #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105; #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105, at a 10⁻⁵ risk level.
- Column D2—all at a 10⁻⁶ risk level except #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105; #23, 30, 37, 38, 42, 68, 89, 91, 93, 104, 105, at a 10⁻⁵ risk level.

(iii) The human health criteria shall be applied at the State-proposed 10⁻⁶ risk level for EPA rated Class A, B₁, and B₂ carcinogens; EPA rated Class C carcinogens shall be applied at 10⁻⁵ risk level. To determine appropriate value for carcinogens, see footnote c. in the matrix in paragraph (b)(1) of this section.

(4) *Puerto Rico, EPA Region 2.* (i) All waters assigned to the following use classifications in the Puerto Rico Water Quality Standards (promulgated by Resolution Number R-83-5-2) are subject to the criteria in paragraph (d)(4)(ii) of this section, without exception.

- Article 2.2.2—Class SB
- Article 2.2.3—Class SC
- Article 2.2.4—Class SD

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(4)(i) of this section:

Use classification	Applicable criteria
Class SD	This Classification is assigned criteria in: Column B1—all, except: 10, 102, 105, 107, 108, 111, 112, 113, 115, 117, and 126. Column B2—all, except: 105, 107, 108, 112, 113, 115, and 117. Column D1—all, except: 6, 14, 105, 112, 113, and 115. Column D2—all, except: 14, 105, 112, 113, and 115.
Class SB, Class SC	These Classifications are assigned criteria in:

Use classification	Applicable criteria
	Column C1—all, except: 4, 5b, 7, 8, 10, 11, 13, 102, 105, 107, 108, 111, 112, 113, 115, 117, and 126.
	Column C2—all, except: 4, 5b, 10, 13, 108, 112, 113, 115, and 117.
	Column D2—all, except: 14, 105, 112, 113, and 115.

(iii) The human health criteria shall be applied at the State-proposed 10⁻⁵ risk level. To determine appropriate value for carcinogens, see footnote c, in the criteria matrix in paragraph (b)(1) of this section.

(5) *District of Columbia, EPA Region 3.*

(i) All waters assigned to the following use classifications in chapter 11 Title 21 DCMR, Water Quality Standards of the District of Columbia are subject to the criteria in paragraph (d)(5)(ii) of this section, without exception:

1101.2 Class C waters

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classification identified in paragraph (d)(5)(i) of this section:

Use classification	Applicable criteria
Class C	This classification is assigned the additional criteria in: Column B2—#10, 118, 126. Column D1—#15, 16, 44, 67, 68, 79, 80, 81, 88, 114, 116, 118. Column D2—all.

(iii) The human health criteria shall be applied at the State-adopted 10⁻⁶ risk level.

(6) *Florida, EPA Region 4.*

(i) All waters assigned to the following use classifications in Chapter 17-301 of the Florida Administrative Code (i.e., identified in Section 17-302.600) are subject to the criteria in paragraph (d)(6)(ii) of this section, without exception:

- Class I
- Class II
- Class III

(ii) The following criteria from the matrix paragraph (b)(1) of this section apply to the use classifications

identified in paragraph (d)(6)(i) of this section:

Use classification	Applicable criteria
Class I	This classification is assigned the criteria in: Column D1—#16
Class II	This classification is assigned the criteria in:
Class III (marine)	This classification is assigned the criteria in:
Class III (freshwater)	This classification is assigned the criteria in: Column D2—#16

(iii) The human health criteria shall be applied at the State-adopted 10⁻⁶ risk level.

(7) *Michigan, EPA Region 5.*

(i) All waters assigned to the following use classifications in the Michigan Department of Natural Resources Commission General Rules, R 323.1100 designated uses, as defined at R 323.1043. Definitions: A to N, (i.e., identified in Section (g) "Designated use") are subject to the criteria in paragraph (d)(7)(ii) of this section, without exception:

- Agriculture
- Navigation
- Industrial Water Supply
- Public Water Supply at the Point of Water Intake
- Warmwater Fish
- Other Indigenous Aquatic Life and Wildlife
- Partial Body Contact Recreation

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(7)(i) of this section:

Use classification	Applicable criteria
Public Water supply	This classification is assigned the criteria in: Column B1—all, Column B2—all, Column D1—all.
All other designations	These classifications are assigned the criteria in: Column B1—all, Column B2—all, and Column D2—all.

(iii) The human health criteria shall be applied at the State-adopted 10⁻⁵ risk level. To determine appropriate value for carcinogens, see footnote c in the criteria matrix in paragraph (b)(1) of this section.

(8) *Arkansas, EPA Region 6.*

(i) All waters assigned to the following use classification in section 4C (Waterbody uses) identified in

Arkansas Department of Pollution Control and Ecology's Regulation No. 2 as amended and entitled, "Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas" are subject to the criteria in paragraph (d)(8)(ii) of this section, without exception:

Extraordinary Resource Waters
Ecologically Sensitive Waterbody
Natural and Scenic Waterways
Fisheries:

- (1) Trout
- (2) Lakes and Reservoirs
- (3) Streams
 - (a) Ozark Highlands Ecoregion
 - (b) Boston Mountains Ecoregion
 - (c) Arkansas River Valley Ecoregion
 - (d) Ouachita Mountains Ecoregion
 - (e) Typical Gulf Coastal Ecoregion
 - (f) Spring Water-influenced Gulf Coastal Ecoregion
 - (g) Least-altered Delta Ecoregion
 - (h) Channel-altered Delta Ecoregion
- Domestic Water Supply

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classification identified in paragraph (d)(8)(i) of this section:

Use classification	Applicable criteria
Extraordinary Resource Waters Ecologically Sensitive Waterbody Natural and Scenic Waterways Fisheries:	<ul style="list-style-type: none"> (1) Trout (2) Lakes and Reservoirs (3) Streams <ul style="list-style-type: none"> (a) Ozark Highlands Ecoregion (b) Boston Mountains Ecoregion (c) Arkansas River Valley Ecoregion (d) Ouachita Mountains Ecoregion (e) Typical Gulf Coastal Ecoregion (f) Spring Water-influenced Gulf Coastal Ecoregion (g) Least-altered Delta Ecoregion (h) Channel-altered Delta Ecoregion

These uses are each assigned the criteria in—
Column B1—
#4, 5a, 5b, 6, 7, 8, 9, 10, 11, 13, 14
Column B2—
#4, 5a, 5b, 6, 7, 8, 9, 10, 13, 14

(9) *Kansas, EPA Region 7.*
 (i) All waters assigned to the following use classification in the Kansas Department of Health and Environment regulations, K.A.R. 28-16-28b through K.A.R. 28-16-28f, are subject to the criteria in paragraph (d)(9)(ii) of this section, without exception.
 Section 28-16-28d
 Section (2)(A)—Special Aquatic Life Use Waters
 Section (2)(B)—Expected Aquatic Life Use Waters
 Section (2)(C)—Restricted Aquatic Life Use Waters
 Section (3)—Domestic Water Supply
 Section (6)(c)—Consumptive Recreation Use.

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(9)(i) of this section:

Use classification	Applicable criteria
Sections (2)(A), (2)(B), (2)(C), (6)(C)	These classifications are each assigned all criteria in:

Use classification Applicable criteria

Section (3) This classification is assigned all criteria in:
 Column B1, all except #9, 11, 13, 102, 105, 107, 108, 111-113, 115, 117, and 126;
 Column B2, all except #9, 13, 105, 107, 108, 111-113, 115, 117, 119-125, and 126; and
 Column D2, all except #9, 112, 113, and 115.
 Column D1, all except #9, 12, 112, 113, and 115.

(iii) The human health criteria shall be applied at the State-proposed 10⁻⁶ risk level.
 (10) *California, EPA Region 9.*
 (i) All waters assigned any aquatic life or human health use classifications in the Water Quality Control Plans for the various Basins of the State ("Basin Plans"), as amended, adopted by the California State Water Resources Control Board ("SWRCB"), except for ocean waters covered by the Water

Quality Control Plan for Ocean Waters of California ("Ocean Plan") adopted by the SWRCB with resolution Number 90-27 on March 22, 1990, are subject to the criteria in paragraph (d)(10)(ii) of this section, without exception. These criteria amend the portions of the existing State standards contained in the Basin Plans. More particularly these criteria amend water quality criteria contained in the Basin Plan Chapters specifying water quality objectives (the State equivalent of federal water quality criteria) for the toxic pollutants identified in paragraph (d)(10)(ii) of this section. Although the State has adopted several use designations for each of these waters, for purposes of this action, the specific standards to be applied in paragraph (d)(10)(ii) of this section are based on the presence in all waters of some aquatic life designation and the presence or absence of the MUN use designation (Municipal and domestic supply). (See Basin Plans for more detailed use definitions.)

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the water and use classifications defined in paragraph (d)(10)(i) of this section and identified below:

Water and use classification

Applicable criteria

Waters of the State defined as bays or estuaries except the Sacramento-San Joaquin Delta and San Francisco Bay

These waters are assigned the criteria in:
 Column B1—pollutants 5a and 14
 Column B2—pollutants 5a and 14
 Column C1—pollutant 14
 Column C2—pollutant 14
 Column D2—pollutants 1, 12, 17, 18, 21, 22, 29, 30, 32, 33, 37, 38, 42-44, 46, 48, 49, 54, 59, 66, 67, 68, 78-82, 85, 89, 90, 91, 93, 95, 96, 98

Waters of the Sacramento—San Joaquin Delta and waters of the State defined as inland (i.e., all surface waters of the State not bays or estuaries or ocean) that include a MUN use designation

These waters are assigned the criteria in:
 Column B1—pollutants 5a and 14
 Column B2—pollutants 5a and 14
 Column D1—pollutants 1, 12, 15, 17, 18, 21, 22, 29, 30, 32, 33, 37, 38, 42-48, 49, 59, 66, 68, 78-82, 85, 89, 90, 91, 93, 95, 96, 98

Waters of the State defined as inland without an MUN use designation

These waters are assigned the criteria in:
 Column B1—pollutants 5a and 14
 Column B2—pollutants 5a and 14
 Column D2—pollutants 1, 12, 17, 18, 21, 22, 29, 30, 32, 33, 37, 38, 42-44, 46, 48, 49, 54, 59, 66, 67, 68, 78-82, 85, 89, 90, 91, 93, 95, 96, 98

Waters of the San Joaquin River from the mouth of the Merced River to Vernalis

In addition to the criteria assigned to these waters elsewhere in this rule, these waters are assigned the criteria in:
 Column B2—pollutant 10

Water and use classification

Applicable criteria

Waters of Salt Slough, Mud Slough (north) and the San Joaquin River, Sack Dam to the mouth of the Merced River

In addition to the criteria assigned to these waters elsewhere in this rule, these waters are assigned the criteria in:
Column B1—pollutant 10
Column B2—pollutant 10

Waters of San Francisco Bay upstream to and including Suisun Bay and the Sacramento-San Joaquin Delta

These waters are assigned the criteria in:
Column B1—pollutants 5a, 10* and 14
Column B2—pollutants 5a, 10* and 14
Column C1—pollutant 14
Column C2—pollutant 14
Column D2—pollutants 1, 12, 17, 18, 21, 22, 29, 30, 32, 33, 37, 38, 42-44, 46, 48, 49, 54, 59, 66, 67, 68, 78-82, 85, 89, 90, 91, 93, 95, 96, 98

All inland waters of the United States or enclosed bays and estuaries that are waters of the United States that include an MUN use designation and that the State has either excluded or partially excluded from coverage under its Water Quality Control Plan for Inland Surface Waters of California, Tables 1 and 2, or its Water Quality Control Plan for Enclosed Bays and Estuaries of California, Tables 1 and 2, or has deferred applicability of those tables. (Category (a), (b), and (c) waters described on page 6 of Water Quality Control Plan for Inland Surface Waters of California or page 6 of its Water Quality Control Plan for Enclosed Bays and Estuaries of California.)

These waters are assigned the criteria for pollutants for which the State does not apply Table 1 or 2 standards. These criteria are:
Column B1—all pollutants
Column B2—all pollutants
Column D1—all pollutants except #2

All inland waters of the United States that do not include an MUN use designation and that the State has either excluded or partially excluded from coverage under its Water Quality Control Plan for Inland Surface Waters of California, Tables 1 and 2, or has deferred applicability of these tables. (Category (a), (b), and (c) waters described on page 6 of Water Quality Control Plan for Inland Surface Waters of California.)

These waters are assigned the criteria for pollutants for which the State does not apply Table 1 or 2 standards. These criteria are:
Column B1—all pollutants
Column B2—all pollutants
Column D2—all pollutants except #2

All enclosed bays and estuaries that are waters of the United States and that the State has either excluded or partially excluded from coverage under its Water Quality Control Plan for Inland Surface Waters of California, Tables 1 and 2, or its Water Quality Control Plan for Enclosed Bays and Estuaries of California, Tables 1 and 2, or has deferred applicability of those tables. (Category (a), (b), and (c) waters described on page 6 of Water Quality Control Plan for Inland Surface Waters of California or page 6 of its Water Quality Control Plan for Enclosed Bays and Estuaries of California.)

These waters are assigned the criteria for pollutants for which the State does not apply Table 1 or 2 standards. These criteria are:
Column B1—all pollutants
Column B2—all pollutants
Column C1—all pollutants
Column C2—all pollutants
Column D2—all pollutants except #2

*The fresh water selenium criteria are included for the San Francisco Bay estuary because high levels of bioaccumulation of selenium in the estuary indicate that the salt water criteria are underprotective for San Francisco Bay.

(iii) The human health criteria shall be applied at the State-adopted 10^{-6} risk level.

(11) Nevada, EPA Region 9. (i) All waters assigned the use classifications in Chapter 445 of the Nevada Administrative Code (NAC), Nevada Water Pollution Control Regulations, which are referred to in paragraph

(d)(11)(ii) of this section, are subject to the criteria in paragraph (d)(11)(ii) of this section, without exception. These criteria amend the existing State standards contained in the Nevada Water Pollution Control Regulations. More particularly, these criteria amend or supplement the table of numeric standards in NAC 445.1339 for the toxic

pollutants identified in paragraph (d)(11)(ii) of this section.

(ii) The following criteria from matrix in paragraph (b)(1) of this section apply to the waters defined in paragraph (d)(11)(i) of this section and identified below:

Water and use classification

Applicable criteria

Waters that the State has included in NAC 445.1339 where Municipal or domestic supply is a designated use

These waters are assigned the criteria in:

- Column B1—pollutant #118
- Column B2—pollutant #118
- Column D1—pollutants #15, 16, 18, 19, 20, 21, 23, 26, 27, 29, 30, 34, 37, 38, 42, 43, 55, 58-62, 64, 66, 73, 74, 78, 82, 85, 87-89, 91, 92, 96, 98, 100, 103, 104, 105, 114, 116, 117, 118

Waters that the State has included in NAC 445.1339 where Municipal or domestic supply is not a designated use

These waters are assigned the criteria in:

- Column B1—pollutant #118
- Column B2—pollutant #118
- Column D2—all pollutants except #2.

(iii) The human health criteria shall be applied at the 10⁻⁶ risk level, consistent with State policy. To determine appropriate value for carcinogens, see footnote c in the criteria matrix in paragraph (b)(1) of this section.

Use classification Applicable criteria

(1)(A) iii Column B1—all
Column B2—#10
Column D1
#s 2, 14, 16, 18-21, 22, 23, 26, 27, 29, 30, 32, 37, 38, 42-44, 46, 53, 54, 55, 59-62, 64, 66, 68, 73, 74, 78, 82, 85, 88-93, 95, 96, 98, 102-105, 107-111, 115-126

- 16.01.2100.02.b. Warm Water Biota
- 16.01.2100.02cc. Salmonid Spawning
- 16.01.2100.03.a. Primary Contact Recreation
- 16.01.2100.03.b. Secondary Contact Recreation

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(13)(i) of this section:

(12) Alaska, EPA Region 10.

(i) All waters assigned to the following use classifications in the Alaska Administrative Code (AAC), Chapter 18 (i.e., identified in 18 AAC 70.020) are subject to the criteria in paragraph (d)(12)(ii) of this section, without exception:

- 70.020.(1) (A) Fresh Water
- 70.020.(1) (A) Water Supply
 - (i) Drinking, culinary, and food processing,
 - (iii) Aquaculture;
- 70.020.(1) (B) Water Recreation
 - (i) Contact recreation,
 - (ii) Secondary recreation;
- 70.020.(1) (C) Growth and propagation of fish, shellfish, other aquatic life, and wildlife
- 70.020.(2) (A) Marine Water
- 70.020.(2) (A) Water Supply
 - (i) Aquaculture,
- 70.020.(2) (B) Water Recreation
 - (i) contact recreation,
 - (ii) secondary recreation;
- 70.020.(2) (C) Growth and propagation of fish, shellfish, other aquatic life, and wildlife;
- 70.020.(2) (D) Harvesting for consumption of raw mollusks or other raw aquatic life.

(1)(B)i, (1)(B) ii, (1)(C)

(2)(A) i, (2)(B)i, and (2)(B)ii, (2)(C), (2)(D)

Column B1—all
Column B2—#10
Column D2
#s 2, 14, 16, 18-21, 22, 23, 26, 27, 29, 30, 32, 37, 38, 42-44, 46, 53, 54, 55, 59-62, 64, 66, 68, 73, 74, 78, 82, 85, 88-93, 95, 96, 98, 102-105, 107-111, 115-126

Column C1—all
Column C2—#10
Column D2
#s 2, 14, 16, 18-21, 22, 23, 26, 27, 29, 30, 32, 37, 38, 42-44, 46, 53, 54, 55, 59-62, 64, 66, 68, 73, 74, 78, 82, 85, 88-93, 95, 96, 98, 102-105, 107-111, 115-126

Use classification	Applicable criteria
01.b	This classification is assigned the criteria in: Column D1—all except #14 and 115
02.a 02.b 02cc	These classifications are assigned the criteria in: Column B1—all Column B2—all Column D2—all
03.a	This classification is assigned the criteria in: Column D2—all
03.b	This classification is assigned the criteria in: Column D2—all

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(12)(i) of this section:

(iii) The human health criteria shall be applied at the State-proposed risk level of 10⁻⁵. To determine appropriate value for carcinogens, see footnote c in the criteria matrix in paragraph (b)(1) of this section.

(13) Idaho, EPA Region 10.

(i) All waters assigned to the following use classifications in the Idaho Administrative Procedures Act (IDAPA), Chapter 16 (i.e., identified in IDAPA 16.01.2100.02-16.01.2100.07) are subject to the criteria in paragraph (d)(13)(ii) of this section, without exception:

- 16.01.2100.01.b. Domestic Water Supplies
- 16.01.2100.02.a. Cold Water Biota

(iii) The human health criteria shall be applied at the 10⁻⁶ risk level, consistent with State policy.

(14) Washington, EPA Region 10.

(i) All waters assigned to the following use classifications in the Washington Administrative Code (WAC), Chapter 173-201 (i.e., identified in WAC 173-201-045) are subject to the criteria in paragraph (d)(14)(ii) of this section, without exception:

- 173-201-045
 - Fish and Shellfish
 - Fish
 - Water Supply (domestic)
 - Recreation

(ii) The following criteria from the matrix in paragraph (b)(1) of this section apply to the use classifications identified in paragraph (d)(14)(i) of this section:

Use classification	Applicable criteria
(1)(A) i	Column B1—all Column B2—#10 Column D1 #s 2, 16, 18-21, 23, 26, 27, 29, 30, 32, 37, 38, 42-44, 53, 55, 59-62, 64, 66, 68, 73, 74, 78, 82, 85, 88, 89, 91-93, 96, 98, 102-105, 107-111, 117-126

Use classification	Applicable criteria	Use classification	Applicable criteria
Fish and Shellfish; Fish	These classifications are assigned the criteria in: Column B1 and B(2)—#2, 10 Column C1—#2, 10 Column C2—#2, 6, 10, 14 Column D2—all	Recreation	This classification is assigned the criteria in: Column D2—Marine waters and freshwaters not protected for domestic water supply
Water Supply (domestic)	These classifications are assigned the criteria in: Column D1—all		(iii) The human health criteria shall be applied at the State proposed risk level of 10^{-6} .

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**Tuesday
December 22, 1992**

Environmental Protection Agency

Part III

**Environmental
Protection Agency**

Draft NPDES General Permits; Notice

**ENVIRONMENTAL PROTECTION
AGENCY**
[FR-4546-7; LAG290000 and TXG290000]
**Proposed NPDES General Permits for
Produced Water and Produced Sand
Discharges From the Oil and Gas
Extraction Point Source Category To
Coastal Waters in Louisiana and Texas**
AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice of draft NPDES general
permit.

SUMMARY: EPA Region 6 is proposing to issue general NPDES permits prohibiting discharges of produced water and produced sand derived from Oil and Gas Point Source Category Facilities to coastal waters of Louisiana and Texas. Facilities covered by these permits include those in the Coastal Subcategory (40 CFR Part, 435, subpart D), the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to coastal waters of Louisiana and Texas, and the Offshore Subcategory (40 CFR part 435, subpart A) which discharge to coastal waters of Louisiana and Texas. As proposed, the permits' prohibitions will become effective 30 days after their final publication. Region 6 may also issue an administrative order requiring that permittees discharging produced water from existing Coastal, Stripper or Offshore Subcategory wells to other than "upland area" waters in Louisiana and to other than "inland and fresh" waters in Texas comply with the permits' produced water discharge prohibitions within three years after final publication of the permits.

DATES: Comments on the proposed permits must be submitted by February 5, 1993.

ADDRESSES: Comments on these proposed permits should be sent to the Regional Administrator, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT:
Ms. Ellen Caldwell, EPA Region 6, 1445 Ross Avenue, Dallas, Texas, 75202.
Telephone (214) 655-7190.

SUPPLEMENTARY INFORMATION:
Supplementary information (fact sheet) provided in this notice is organized as follows:

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- III. Facility Coverage.
- IV. Types of Discharges Covered.
- V. Compliance Delays.
- VI. Specific Permit Conditions.
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 - a. Improved performance of BPT technology

- b. Granular filtration
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- f. Evaluation of options using BCT cost test
- g. Summary of BCT for produced water
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- B. Best Available Technology Economically Achievable (BAT) Conditions
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 - b. Characteristics of Produced Water as Related to BAT
 - c. Derivation of BAT (BPJ) Permit Requirements
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 - d. BAT Cost Analysis for No Discharge
 - e. BAT Option Selection
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 - (2) Characteristics
 - (3) Fate and environmental impact of produced water
 - (4) Biological toxicity
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 - (1) Discharges to upland waters
 - (2) Discharges to intermediate, brackish or saline waters
 - c. Texas Rules for Produced Water Discharges
 - d. Louisiana Water Quality Standards
 - (1) Narrative standards
 - (2) Numerical criteria
 - (3) Mixing zones
 - (4) Modeling of produced water discharges
 - e. Texas Water Quality Standards
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 - (2) Numerical criteria
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 - (5) Modeling of produced water discharges
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 - g. Summary of Produced Water Requirements based on State Regulations and Water Quality Standards
 - (1) Louisiana
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2. Produced Sand
 - a. State Regulations for Produced Sand
 - b. Louisiana Water Quality Standards
 - c. Texas Water Quality Standards
 - d. Summary of Produced Sand Requirements based on State Water Quality Standards

- D. Summary of Produced Water and Produced Sand Requirements

I. Legal Basis

Section 301(a) of the Clean Water Act (CWA or the Act), 33 U.S.C. 1311(a), renders it unlawful to discharge pollutants to waters of the United States in the absence of authorizing permits. CWA section 402, 33 U.S.C. 1342, authorizes EPA to issue National Discharge Elimination System (NPDES) permits allowing discharges on condition they will meet certain requirements, including CWA sections 301, 304, and 401, 33 U.S.C. 1311, 1314, and 1341. Those statutory provisions require that NPDES permits include effluent limitations requiring that authorized discharges:

- (1) Meet standards reflecting levels of technological capability.
- (2) Comply with EPA-approved state water quality standards and
- (3) Comply with other state requirements adopted under authority retained by states under CWA 510, 33 U.S.C. 1370.

Two types of technology-based effluent limitations must be included in the permits proposed here. With regard to conventional pollutants, i.e., pH, BOD, oil and grease, TSS, and fecal coliform, CWA section 301(b)(1)(E) requires effluent limitations based on "best conventional pollution control technology" (BCT). With regard to nonconventional and toxic pollutants, CWA section 301(b)(2) (A), (C), and (D) require effluent limitations based on "best available pollution control technology economically achievable" (BAT), a standard which generally represents the best performing existing technology in an industrial category or subcategory. BAT and BCT effluent limitations may never be less stringent than corresponding effluent limitations based on best practicable control technology (BPT), a standard applicable to similar discharges prior to March 31, 1989 under CWA 301(b)(1)(A).

Frequently, EPA adopts nationally applicable guidelines identifying the BPT, BCT, and BAT standards to which specific industrial categories and subcategories are subject. Until such guidelines are published, however, CWA section 402(a)(1) requires that EPA determine appropriate BCT and BAT effluent limitations in its NPDES permitting actions on the basis of its best professional judgment (BPJ). BPT standards for the Oil and Gas Extraction Point Source Category are codified at 40 CFR part 435, with BPT standards which were applicable to the Coastal Subcategory at subpart D. Because EPA has not promulgated BAT or BCT

guidelines for the Oil and Gas Extraction Point Source Category or any of its Subcategories, the BAT and BCT effluent limitations Region 6 proposes here are based on BPJ, after consideration of factors listed at 40 CFR 125.3(d) (2) and (3). As explained hereinafter, those limitations will prohibit any discharge of produced water or produced sand to "coastal" waters in Louisiana and Texas.

Although the Agency typically issues NPDES permits to the operators of individual facilities, it may also issue "general permits" applicable to a class of similar dischargers within a discreet geographical area. See generally *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977); 40 CFR 122.28. Issuance of such permits is not controlled by the procedural rules EPA uses for individual permits, but is instead subject to section 4 of the Administrative Procedure Act (APA), 5 U.S.C. 553, as supplemented by EPA regulations, e.g., 40 CFR 124.58. EPA must, however, comply with the substantive requirements of the CWA without regard to whether it is issuing an individual or general NPDES permit.

II. Regulatory Background

Because operations within the Oil and Gas Extraction Point Source Category vary widely, EPA has subcategorized it for the purpose of developing technology-based effluent guidelines. Those subcategories now codified at 40 CFR part 435, are the "Offshore," "Onshore," "Coastal," "Stripper," and "Agricultural and Wildlife Water Use" subcategories.

As codified at 40 CFR part 435, EPA guidelines based on the application of best practicable technology (BPT) prohibit the discharge of produced water and produced sand from the Onshore Subcategory, but allow such discharges subject to various limitations from facilities in all other subcategories. BPT guidelines for the Coastal Subcategory, for instance, allow the discharge of produced water subject to an oil and grease limitation of 72 milligrams per liter (mg/l) daily maximum and 48 mg/l monthly average, representing the performance of oil-water separation technology in 1979. See 40 CFR 435.42.

On December 27, 1983, Region 6 proposed a general permit for "Inland Waters," covering in part the same geographical area as the permits proposed today. 48 FR 57001. That proposed permit, which was based on the Agency's BPT guidelines, was never issued in final form. Nor could Region 6 now issue that permit as proposed. Since March 31, 1989, CWA section 301 has required EPA to apply industrial

effluent limitations based on the more stringent BAT and BCT standards, rendering the Agency's BPT guidelines obsolete.

EPA has been developing BAT guidelines for the Oil and Gas Extraction Point Source Category for several years, but to date has not promulgated such guidelines. The most recent guidelines development action potentially affecting the Coastal Subcategory occurred on November 8, 1989, when the Agency published a notice discussing possible amendment to the current definition of "coastal" and alternative approaches to developing BAT guidelines. 54 FR 46919. In developing today's proposal, Region 6 has considered information on which that notice was based, together with information the Agency received in response to its publication.

On June 7, 1990, Region 6 proposed general permits for discharges from drilling activities of Coastal Subcategory facilities in Texas and Louisiana. 55 FR 23348. Because produced water and produced sand are normally associated with production, not drilling, activities, those draft permits included no proposed effluent limitations on those waste streams. EPA will probably promulgate the final Coastal "drilling" permits before it promulgates the Coastal produced water and sand permits proposed today, but reserves the option of issuing unified general permits covering all discharges from Coastal Subcategory drilling and production activities in a single final publication.

III. Coverage

The part 435 guideline definition of "coastal" was promulgated in a final rule on April 13, 1979. See 40 CFR 435.31(e); 44 FR 22069. Under that definition, "coastal" means "(1) any body of water landward of the territorial seas as defined in 40 CFR 125.1(gg), or (2) any wetlands adjacent to such waters." There are three ambiguities associated with this definition. First, it fails to indicate whether a Coastal Subcategory facility is one which discharges to a "coastal" water or one which is constructed in a "coastal" water. Second, "40 CFR 125.1(gg)" is no longer an EPA regulation, having been deleted in a June 7, 1979 revision to part 125. See 44 FR 32948. Third, the "wetlands adjacent" term of the definition suggests to some that wetlands which are not adjacent to other waters may not be "coastal."

In Region 6, these ambiguities were resolved on February 25, 1991, when the Region issued four final NPDES permits prohibiting discharges from

Onshore Subcategory facilities in Louisiana, Texas, New Mexico, and Oklahoma. 56 FR 7698. After examining the regulatory history that indicates that the basis for subcategorization lay in technological differences associated with facility location, not discharge location, EPA determined that a Coastal Subcategory facility was one in which the wellhead was located over a surface waterbody. 56 FR 7698-7699. Noting that former 40 CFR 125.1(gg) had been a verbatim recitation of CWA section 502(3), Region 6 relied on that statutory definition of "territorial seas." 56 FR 7699. In a somewhat similar vein, Region 6 found the part 435 reference to "adjacent wetlands" was adopted before the Agency's jurisdictional definition included a reference to "wetlands" and had thus been intended to indicate all "waters of the United States" shoreward of the territorial seas were "coastal." 56 FR 7699.

Region 6 continues to interpret the part 435 "coastal" definition in that fashion. As proposed, the permits thus apply to all Louisiana and Texas facilities with wellheads located in "waters of the United States," as defined at 40 CFR 122.2. Facilities which would be considered "Onshore" but for the decision in *API v. EPA*, 661 F.2d 340 (5th Cir. 1981) will also be subject to the permits if EPA issues them as proposed. See 47 FR 31554 (July 21, 1982).

In addition, Region 6 is proposing to prohibit the discharge of produced water derived from Offshore Subcategory facilities to "coastal" waters. As discussed later in this Fact Sheet, the discharge of these produced waters, as well as produced waters from other Subcategory facilities to "coastal" waters would violate state water quality standards and certain state regulations.

The Minerals Management Service (MMS91-004) has identified eleven major produced water disposal facilities which treat both Offshore and Coastal Subcategory produced water, then discharge it to Louisiana coastal waters. If the permits are promulgated as proposed, they will prohibit such facilities from discharging Coastal Subcategory produced water at any location and prohibit the discharge of Offshore Subcategory produced water to "coastal" waters, i.e., any water of the United States shoreward of the territorial seas. They will not, however, prohibit the discharge of Offshore Subcategory produced water to offshore waters, even if it has first been treated at a shore-based facility. Otherwise, the permits would operate as a disincentive for the voluntary onshore treatment of that produced water.

The Stripper Subcategory applies to those onshore facilities producing no more than ten barrels of oil per day while operating at the maximum feasible rate of production and in accordance with recognized conservation practices. See 40 CFR 435.60. EPA has developed no-BPT effluent limitation guidelines for the Stripper Subcategory, reasoning that such low production rates provide insufficient capital for retrofitting pollution control technology, but has also suggested that further study of joint disposal options might result in BPT guidelines prohibiting the discharge of produced water from Stripper Subcategory facilities. See 42 FR 44942, 44948 (October 13, 1976). Given the less stringent cost analysis involved in BAT determinations, it seems possible BAT effluent limitations for strippers would prohibit the discharge of produced water. Indeed, according to verbal communications from the Oklahoma Corporation Commission, it appears the State of Oklahoma has already eliminated all stripper well discharges to surface water over which it has jurisdiction. Region 6 has not to date, however, done an independent cost analysis for making a BAT determination for the Stripper Subcategory.

Nevertheless, Stripper Subcategory facilities which discharge into "coastal" waters of Louisiana and Texas will also be subject to the general permits' no discharge limitations for produced sands and water if the permits are issued as proposed. As applied to Stripper Subcategory wells, those limitations are required to assure compliance with state water quality standards and other requirements Louisiana and Texas have adopted pursuant to authority they retain under CWA section 510. Those standards and requirements are discussed in a later section of this notice.

Under CWA, an NPDES permittee's "discharges" include discharges performed on its behalf by another party, including a contractor. EPA Region 6 recently learned that some operators subject to the discharge prohibitions of one of its Onshore Subcategory general permits nevertheless believed they were not liable for discharges by parties with whom they contracted for produced water disposal. To avoid such confusion in the future, the general permits EPA Region 6 today proposes prohibit permittees from "causing or contributing" to discharges prohibited by the permits. Causing or contributing to such a discharge includes contracting with another party which actually

discharges the pollutants or transports them to a third party which actually discharges them. In addition, disposal contractors have been listed as a class of permittees under the proposed permits, a provision which will render operators and their disposal contractors jointly and severally liable for permit violations. These provisions, which are necessary to assure compliance with the discharge prohibitions of the permits, are authorized by CWA section 402(a)(2).

In summary, the permits will, if issued as proposed, prohibit discharges of produced water and produced sand derived from facilities in the Coastal, Offshore, and Stripper Subcategories to all waters of the United States shoreward of the inner boundary of the Territorial Seas in Louisiana and Texas. In addition, the permits will prohibit the discharge of produced water and produced sand derived from facilities in the Coastal Subcategory to any other water of the United States. It is the responsibility of the permittee to determine if his discharge is covered by this permit. Current National Oceanic and Atmospheric Administration (NOAA) nautical charts can be of assistance in locating the outer boundary of the general permit area. These charts cover the entire coasts of Texas and Louisiana at a 1:60,000 scale, although certain ports and bays have more detailed coverage. They are available from NOAA charts agents, such as marinas and marine supply stores.

Similar discharges from Onshore Subcategory facilities are already prohibited by Onshore Subcategory General NPDES Permits LAG320000 and TXG320000, published at 56 FR 7698 (February 25, 1991). Issuance of the permits proposed today will thus lead to elimination of virtually all produced water and produced sand discharges in Louisiana and Texas, with the exception of Agricultural and Wildlife Water Use Subcategory facilities West of the 98th parallel.

IV. Types of Discharges Covered

Only two waste streams are specifically covered under the general permits proposed here. They are:

(1) Produced water, which is water and particulate matter associated with oil and gas producing formations. Produced water, sometimes called "formation water" or "brine water," includes small volumes of source water and treatment chemicals that return to the surface with the produced formation fluids and pass through the produced water treating systems currently used by many oil and gas operators.

(2) Produced sand, which is sand and other particulate matter from the producing formation and production piping (including corrosion products), as well as source sand and hydrofrac sand. Produced sand comes to the surface mixed with crude oil and produced water, from which it is generally separated by a produced water desander and treatment system. Produced sand also includes sludge generated by any chemical polymer used in a produced water treatment system.

Other waste streams associated with Coastal Subcategory oil and gas activities include drilling fluids (muds), well treatment fluids, blowout preventer fluids, well completion fluids, formation test fluids, workover fluids, treated waste water from dewatered drilling fluids and cutting, drill cuttings, cement, deck drainage, desalinization discharges, domestic and sanitary wastes, uncontaminated ballast/bilge water, uncontaminated seawater, and uncontaminated freshwater. As noted above, Region 6 proposed general NPDES permits regulating those waste streams at 55 FR 23348 (June 7, 1990).

V. Compliance Delays

The reinjection technology on which the permits' produced water discharge prohibitions are based is fully available and has been successfully used by oil and gas operators for many years. Information from the Louisiana Department of Environmental Quality (LDEQ) shows that, as of September 1991, there were 1500 oil and gas wells in "upland areas" that either had ceased or were to cease discharge of (reinject) produced water no later than July 1992, and that out of a total of 464 wells in non-"upland areas" (and excluding territorial seas), 130 were reinjecting produced water and 32 more were on a schedule to reinject. Information from the Texas Railroad Commission (TRC) shows that, as of October 1989, out of a total of 7613 active oil and gas wells in Texas, 6464 were inland of the Chapman Line and 1149 were seaward of the Chapman Line. The Chapman Line is a rough boundary separating "inland and fresh" waters (to which produced water cannot be discharged according to state regulations) from saline waters. This means that of 7613 wells, about 6400 were reinjecting produced water in October 1989.

As a practical matter, some operators, who will be subject to this permit and are not already prohibited by state regulations from discharging produced water, will not be able to employ that technology during the 30 day period between the final publication of the

permits and their effective date. They will have to construct injection wells to eliminate their produced water discharges and will moreover be required to obtain Class II Underground Injection Control (UIC) Permits from the appropriate State regulatory agencies, e.g., the LDEQ and TRC, each of which is authorized to administer a Class II UIC program under the Safe Drinking Water Act in its own state. Even if they started today, it is unlikely these regulatory agencies could process the number of Class II UIC permit applications the oil industry would require for complying with the proposed NPDES general permits by 30 days after the final permits are published. Region 6 also doubts there are enough drilling contractors doing business in Texas and Louisiana to physically construct such a potentially large number of injection wells at a reasonable cost in time for short term compliance with final general permit prohibitions on the discharge of produced water. In addition, time will be required for some facilities to reroute produced water collection lines in order to transport the produced water to injection wells. Accordingly, Region 6 anticipates wide scale noncompliance with the produced water discharge prohibitions as soon as the permits become effective.

Past experience with general NPDES permitting in Region 6 suggests that imposing new requirements on an industry-wide basis may lead to chaotic situations in the absence of a phase-in period. In 1986, for instance, EPA issued a general permit regulating discharges from offshore Subcategory oil and gas facilities on the outer continental shelf of the Gulf of Mexico. See 51 FR 24897 (July 9, 1986). That permit required, *inter alia*, that all offshore operators test their drilling fluids for toxicity before discharge, using *Mysidopsis bahia* as test organisms. Although mysids had been previously used for aquatic toxicity testing in a number of state environmental programs, never before had there been a demand for them as great as this permit feature created. When the permit became effective, there was simply not a great enough supply of mysids to meet this new demand and Region 6 was thus compelled to stay the Offshore general permit's limitation on drilling fluid toxicity until suppliers were able to react. 51 FR 33130 (September 18, 1986).

Providing a phase in period is, however, somewhat problematic. Pursuant to CWA section 301 and 40 CFR 122.47(a)(1), NPDES permits may not include provisions allowing dischargers to achieve compliance with

BAT limitations past March 31, 1989. Accordingly, the Region plans to issue a general administrative order under authority of CWA 309(a)(3) when it publishes the final permits. Although the order will not authorize discharges of produced water, EPA will not generally initiate an enforcement action against an operator to whom the order applies as long as that operator complies with the order's terms.

As now envisioned, a draft of the general administrative order is published as Appendix A to this notice. Because this is a somewhat unusual situation, Region 6 is taking the somewhat unusual measure of soliciting comment on the prospective terms of an administrative compliance order. It should be noted, however, that this will not render the general order judicially reviewable in the same manner as the final permit. It is well settled that EPA-issued administrative compliance orders are not ripe for judicial review until the Agency enforces them. See, e.g., *City of Baton Rouge v. U.S. EPA*, 620 F 2d 478 (5th Cir. 1980).

As drafted, the administrative order will apply to only those discharges from existing wells to "coastal" waters of Louisiana other than "upland area waters" and to "coastal" waters of Texas other than "inland or fresh waters", and from existing Coastal Subcategory wells to other Waters of the United States. The LDEQ has adopted LAC:33, IX, 7.708, regulating discharges of produced water. That State rule, which is more fully described later in this notice, prohibits discharges to "upland waters," a term generally denoting those Louisiana surface waters located north of the nine coastal parishes contiguous to the Gulf of Mexico, cease by July 1, 1992. Regulations of the TRC (Statewide Rule 8(e)) likewise prohibit the discharge of produced water to inland and fresh surface waters in Texas.

EPA moreover perceives no reason that the order should apply to discharges from new facilities, i.e., wells spudded after the effective date of the permits. If such wells are currently envisioned, they are still in the planning stage, so obtaining access to reinjection facilities should at most merely delay the time at which they can be drilled and operated.

EPA Region 6 also solicits comment on the final compliance date of the draft order. In adopting LAC. 33, IX, 7.708, LDEQ has already considered this issue and established a schedule under which facilities discharging produced water to saline coastal waters must either cease discharge or meet specified State effluent limitations. That schedule, which appears to be only indirectly

based on water quality considerations, will require all Louisiana operators to comply with the rule no later than January 1, 1997, except for operators discharging to certain open bays along the Gulf coast, who may seek exemptions from the rule. In addition, operators may continue to discharge to major deltaic passes of the Mississippi River or to the Atchafalaya River if authorized by a State-issued permit. Because it has adopted no prohibition on discharges of produced water to saline surface waters, TRC has not adopted a corresponding schedule for cessation of such discharges.

Region 6 has no desire to work at cross purposes to either LDEQ or TRC. It must, however, exercise independent judgment in including a final compliance date in the administrative order. As drafted, the administrative order requires final compliance three years after its issuance. The degree to which this would require faster compliance in Louisiana is uncertain, depending on the date of EPA's final action on this proposal. EPA does not, on the other hand, intend to allow any discharger more time to comply with Louisiana's limitations than the State allows. See CWA 301(b)(1)(C). The proposed Louisiana permit thus mandates compliance with the requirements of LAC. 33, IX, 7.708 *via* narrative limitation and the draft administrative order does not affect that permit provision.

EPA usually includes interim limits in the administrative compliance orders it issues and Region 6 is considering imposing interim limits on produced water discharges which would be subject to the administrative order. It might for example base such a limit on the BPT Coastal Subcategory guidelines (40 CFR 435.42). Because those guidelines are based on a treatment technology that has been available and widely used for many years, its adoption would arguably require little operator effort. Region 6 believes, however, that a number of operators now discharging produced water to coastal waters of Louisiana and Texas may not have installed separation equipment capable of complying with a BPT limit. To comply with an interim BPT limit, such operators may have to make a substantial short-term investment in new oil/water separation equipment which might be rendered obsolete at the end of the administrative order's delayed compliance period. The increased cost of purchasing and installing that equipment appears unreasonable to EPA Region 6 in view of the short-term and relatively modest

water quality improvements in which its application would result.

This does not, of course, mean that operators subject to the permits and administrative order can simply fail to control their discharges until they comply with final permit limits. The draft administrative order contains a provision requiring operation and maintenance of existing pollution control equipment, including oil/water separators, at all times. Requiring some form of discharge monitoring and/or reporting in the administrative order would render those operation and maintenance provisions more enforceable, but the draft order contains no such monitoring and reporting requirement. Region 6 will carefully consider all suggestions for such monitoring and reporting requirements in view of its competing desire to avoid unnecessary paperwork.

Dated: December 9, 1992.

W. B. Hathaway,
Acting Regional Administrator, Region 6.

VI. Specific Permit Conditions

Appropriate permit conditions are based on

(A) Best Conventional Pollutant Control Technology (BCT) to control conventional pollutants,

(B) Best Available Treatment to control toxic and nonconventional pollutants,

(C) Louisiana Produced Water Regulations

(D) Louisiana Water Quality Standards

(E) Texas State regulations, and

(F) Texas Water Quality Standards.

Discussions of the rationale for specific effluent limitations for produced water and produced sands appear below. For convenience, these requirements and their regulatory basis are cross-referenced by the type of discharge in Table 1.

A Best Conventional Pollutant Control Technology (BCT) Conditions

Since no Coastal Subcategory effluent guidelines beyond BPT exist, the Region is establishing BCT effluent limitations on a best professional judgment basis (BPJ). The BPJ evaluations include a review of produced water treatment options developed by the Agency for the proposed Offshore Subcategory guidelines (50 FR 34591, August 26, 1985; 55 FR 49094, November 26, 1990; and 56 FR 10664, March 13, 1991), since those treatment options will be applicable to coastal produced waters. As explained in the following pages, BCT requirements for produced water are the same as existing BPT limitations

(48 mg/l daily average, 72 mg/l daily maximum oil and grease), because a more stringent treatment option did not pass the BCT cost test. The Region is proposing as a BCT requirement that the discharge of produced sand be prohibited, because the zero discharge requirement passes the BCT cost test.

1. Produced Water

As explained in the following pages, BCT requirements for produced water are the same as existing BPT limitations (48 mg/l daily average, 72 mg/l daily maximum oil and grease) because a more stringent treatment option did not pass the BCT cost test.

As discussed below, the technology evaluated for possible produced water BCT controls more stringent than BPT include improved performance of BPT technology, filtration, biological treatment and reinjection. Due to the similarities between Coastal and Offshore produced water characteristics and control technologies, the same BCT produced water control technologies are evaluated for Coastal that were evaluated in the proposed Offshore Subcategory guidelines (50 FR 34591; 55 FR 49094, November 26, 1990; and August 26, 1985; 56 FR 10664, March 13, 1991). The BPT limitations, 49 mg/l daily average and 72 mg/l daily maximum, on oil and grease have been promulgated at 44 FR 22069 (April 13, 1979) and codified at 40 CFR part 435, Subpart D.

a. Improved performance of BPT technology. This technology consists of improved operation and maintenance of existing gas flotation equipment, more operator attention to treatment system operation, and possibly resizing of certain treatment system components for better treatment efficiency. The 1985 Offshore guidelines action, which included results from a 30 platform study, found that improved BPT performance could achieve a 59 mg/l oil and grease maximum concentration for discharged produced water.

The March, 1991, proposed Offshore guidelines reanalyzed the 30 platform data related to improved BPT performance evaluation, and found that oil and grease limitations achieved through improved BPT performance would be 38 mg/l as a daily maximum and 27 mg/l as a monthly average. Because of a lack of adequate documentation on samples used in the original 30 platform study upon which the improved BPT performance test was conducted, this treatment was not listed as a preferred Agency option in the 1991 proposed Offshore Guidelines. EPA, however, received additional data on performance of improved gas flotation

technology in response to the 1991 proposal, and as part of a petition requesting that the method for determining compliance with the oil and grease limits be one that measures only "insoluble" oil & grease. The data now being used in arriving at the final decision on produced water limits in the Offshore Guidelines is EPA's 30 Platform Study, the OOC's 42 Platform Study (1990), the OOC's 83 Platform Composite Study (1991) and EPA's "Oil Content in Produced Brine on Ten Louisiana Production Platforms" (1981). EPA is, therefore, reconsidering improved performance gas flotation treatment for produced water for the Offshore Guidelines, and as will be discussed later in this Fact Sheet, is expected to have this treatment as the preferred BAT option for the final Offshore Guidelines. The improved performance gas flotation, however, does not pass the BCT cost test for the Offshore Guidelines. The Region is taking the position that improved performance gas flotation will also not pass the BCT cost test for the Coastal Subcategory wells.

b. Granular filtration. Granular filtration removes suspended matter, as well as oil and grease from produced water. The 1985 Offshore guidelines proposal indicates that granular filtration can reduce total suspended solids (TSS) and oil and grease beyond the BPT level of control treatment for offshore and coastal produced water. It found, however, that granular filtration systems are not useful in the removal of soluble materials and priority pollutants. Both the above cited 1985 and 1991 Offshore guidelines proposals found that granular filtration technology warranted further consideration for new source performance standards (NSPS) and BCT and reserved this option. The 1991 proposed Offshore guidelines suggest that granular filtration could achieve oil and grease discharge limits of 16 mg/l daily average and 29 mg/l daily maximum.

The Region has not adopted granular filtration as an add-on BPT technology option for BCT in these coastal permits. Although granular filtration is effective in reducing discharge concentration levels of oil and grease below BPT, the 1991 proposed Offshore guidelines showed that this technology does not pass the BCT cost test (i.e., the POTW comparison test).

c. Membrane filtration. In considering add-on technology to BPT, the Agency also considered membrane filtration in the 1991 proposed Offshore guidelines. In this proposed rule, it was found membrane filtration technology reflected adequate treatment beyond

BPT for the offshore and was more efficient in the removal of organic compounds than either BPT or granular filtration technologies. The proposed guidelines found that membrane filtration as a BPT add-on was capable of achieving oil and grease discharge limits of 7 mg/l monthly average and 13 mg/l daily maximum.

Membrane filtration, at this time, does not appear practicable as an add-on option to BPT in the Coastal Subcategory because of the lack of an adequate data base derived from facilities located in the area and because the current data have not yet demonstrated the technology to be readily available at facilities in the Coastal Subcategory. In addition, the 1991 proposed Offshore guidelines found that this technology did not pass the BCT cost test.

d. Biological treatment. In the 1985 Offshore Guidelines proposal, the Agency considered biological treatment for produced water as add-on technology to BPT as a means to reduce the content of oil and grease in produced water. Investigations showed that there are severe problems with acclimating and maintaining biological cultures in produced waters in effluents with high dissolved solids concentrations (brines). Consequently, in the 1991 proposed Offshore guidelines, EPA rejected this technology from further consideration as an add-on BPT option for BCT.

e. Reinjection. In the 1991 proposed Offshore guidelines, EPA also evaluated reinjection, which may also include the removal of oil and suspended matter, as a treatment option for produced water. The removal of oil and suspended material prior to injection may be required to prevent pressure build-up in the receiving formation. The application of reinjection technology results in no discharge.

Reinjection has not been adopted as a BCT level of control for conventional pollutants by the Region because this technology does not pass the BCT cost test (see Section VI.A.1.f, below).

f. Evaluation of options using BCT cost test. The BCT treatment technologies considered in the 1991 proposed Offshore guidelines (or reconsidered as a result of comments) and outlined above involve either improved gas flotation (improved performance BPT), filtration as add-on to BPT (granular or membrane) or reinjection. In the 1991 proposed Offshore guidelines (and in reconsideration as a result of comments), all of these treatment technology options were evaluated according to the BCT cost tests. The

parameters used in those analyses were TSS, and oil and grease. All of the BCT options failed BCT cost tests except for BCT equal to BPT. On the basis of the test results, the Agency set BCT=BPT for produced waters in the offshore in both the cited 1985 and 1991 actions and is expected to maintain this position in the final decision on the Offshore guidelines.

For this permit, the BCT cost test results will be the same as for the proposed Offshore guidelines. The Region, however, has recalculated the BCT cost tests for reinjection because a recent Region 6 survey of production statistics and disposal cost data for the Coastal Subcategory shows that the cost is significantly higher than the \$3.47 to \$3.71 per pound of conventional pollutant removed developed from the data set used in the 1991 proposed Offshore guidelines.

The Regions BCT cost test for oil and grease removal was based on the current BPT limitation of 48 mg/l monthly average. The oil and grease concentration per barrel of produced water is, therefore, 48 mg/l X 159 l/bbl, or 7,632 mg oil and grease per barrel. In pounds this amount is equivalent to 0.0167 pounds per barrel. The cost of injection was found to vary according to location (i.e., costs related to facilities located over land, marsh or water). The range of these costs has been determined by industry (Walk & Haydel, 1989) to be \$0.20 to \$0.52 per barrel (1991 dollars). Per barrel costs reevaluated from the data base used by Walk and Haydel (M. Kavanaugh for Avanti to EPA, 1/17/92) was found to range from \$0.15 (for a large land-based injection facility with 100% capacity utilization) to \$1.02 (for a small bay-based facility with 50% capacity utilization) per barrel (1991 dollars). Utilizing the lowest costs from the reevaluated Walk and Haydel data, the cost for reinjection of produced water is \$0.15 per barrel, or \$8.96 per pound of oil and grease removed. This cost significantly exceeds the BCT base-line cost of \$0.46 per pound of pollutant removed and, therefore, reinjection fails the BCT cost test. The failure of this first portion of the BCT cost test (the POTW comparison) obviates the need to perform the second portion of the test (Internal Cost Ratio Test).

g. Summary of BCT for produced water: The treatment options evaluated for BCT are: Improved performance of BPT technology, add-on granular filtration to BPT, add-on membrane filtration, add-on biological treatment and reinjection. These options are the same as those considered in the 1991 proposed Offshore guidelines, since the

appropriateness of these treatment technologies should be the same for both offshore and coastal produced water treatment. As with the proposed offshore guidelines, all of the technologically promising treatment options beyond BPT were rejected because they did not pass the BCT cost test. Therefore, the BCT level of control for produced water remains the same as BPT, 48 mg/l daily average and 72 mg/l daily maximum for oil and grease.

2. Produced Sand

Produced sand, after being separated from the produced water, is either transported in drums to approved non-hazardous waste disposal sites, or washed with water or solvent and then discharged. The primary pollutant of concern under BCT is oil and grease. No BPT, BCT and BAT guidelines limits for produced sand have been promulgated for the Coastal or Offshore Subcategories. The 1991 proposed offshore guidelines did select BCT for proposed sand as "no free oil" without, however, evaluating the no discharge option under the BCT cost test. The available options for BCT are either the no discharge or the "no free oil" levels of control. Since the no discharge option is the most effective at reducing the discharge of conventional pollutants, this option was selected for evaluation under the BCT cost test.

a. BCT cost analysis for no Discharge. This BCT cost analysis for produced sands is based on the following assumptions: Disposal costs will be similar to those for muds and cuttings; specific gravity of produced sand will range from 2.6 g/ml to a high of 2.8 g/ml, porosity of "settled" produced sand will range from 30% to 50% (the unlikely higher value is used to test low sand to water volume ratio); all sands are measured as TSS as per 40 CFR part 136 (Standard Method, 209 C (filtration)). The following calculations were made:

- One barrel (159 liters) of sand at 30 to 50% porosity yields 79.5 to 111.3 liters of produced sand;
- Specific gravities of 2.6 to 2.8 g/ml yields produced sand weights of 455 to 684 pounds per barrel.

A per barrel cost for land disposal of a barrel of drill cuttings and drilling mud has been calculated in the proposed 1991 Offshore guidelines to be \$35 to \$51 per barrel. Of these costs, \$7 to \$10 per barrel had been allocated to land disposal cost, with the remainder being allocated to transportation costs. Using a worst case scenario (\$51 per barrel disposal cost) and the lowest estimates of pounds of pollutants removed per barrel (estimated highest

porosity 50%), the cost of land disposal of produced sand is \$0.11 per pound of TSS removed. This cost is well below the BCT/POTW benchmark cost of \$0.46 per pound of conventional pollutant removed. Alternatively, the Development Document for the proposed 1991 Offshore subcategory guidelines (EPA 440/1-91-055, March 1991, page VI-28) estimates land disposal of muds and cuttings costs to be \$33 to \$111 per barrel. A "worst case" analysis, using the higher disposal cost (\$111/barrel) and the lowest amount of TSS removed (445 lbs derived from the highest porosity/barrel of sand) results in a \$0.24/pound conventional pollutant removal cost, also well below the POTW benchmark of \$0.46 per pound. Both cost exercises, therefore, meet the BCT cost test for conventional pollutants.

The above cost estimates are definitely "worst case" because the transportation costs, which are a large part of the disposal costs for muds and cuttings, are expected to be minimal for produced sand. This is due to the small volumes of sand produced per well and the fact that, for the most part, they are infrequently discharged. This is the case for Coastal Subcategory wells as well as Offshore Subcategory wells.

The Internal Cost Ratio (ICR) test is the second part of a BCT cost test. This test assesses the ratio of current-to-BPT incremental cost ratios. Quantification of BPT costs for disposal of produced sand are not available because the BPT guidelines for the Coastal Subcategory do not specifically deal with this waste stream. Onshore disposal of some of this waste is a current industry practice. The Offshore Operators Committee (OOC) estimates that 32% of the produced sands in the offshore (a 1991 May survey indicates 13,225 barrels of a total 41,627 barrels) were disposed of onshore. Therefore, it is assumed that the disposal costs under BPT are approximately the same as has been calculated for BCT, above, and the Industry Cost Ratio (ICR) will approximate unity. Thus, this portion of the BCT cost test also is passed by the zero discharge limitation for coastal facilities:

b. Summary of BCT for produced sand. The zero discharge limitation on the discharge of produced sand is proposed for these permits because onshore disposal costs fall significantly below the BCT benchmark removal cost for conventional pollutants.

B Best Available Technology Economically Achievable (BAT) Conditions

1. Produced Water

As explained in the following pages, BAT for Coastal produced water is determined to be no discharge, based on best professional judgement.

a. Sources of data and information. Information used in determining BAT for produced water includes EPA reports, guidelines documents, responses to formal requests for information, data and information from state regulatory agencies, Minerals Management Service (MMS) environmental impact and technical reports, American Petroleum Institute (API) studies, data provided by the Offshore Operators Committee (OOC), proceedings from industry conferences and symposia, and published technical journal reports. In addition, a number of individuals in state agencies provided, through personal communications, a variety of data used preparing this section. The references cited in portions of the text, are listed at the end of this fact sheet.

b. Characteristics of produced water as related to BAT. The pollutants contained in produced water have been characterized as including oil and grease, dispersed and dissolved hydrocarbons, heavy metals, treating chemicals and radionuclides. Boesch and Rabalais (1989) have estimated produced water discharged into Coastal Subcategory waters and territorial seas waters of Louisiana to be 1,952,386 barrels per day, revised in 1991 (MMS 91-004) to 1,954,049 barrels per day. The same authors report that daily, 721,745 barrels of produced water are discharged to the Coastal Subcategory Waters of Texas.

In the proposed 1991 Offshore guidelines a 30 platform study which gave the concentrations of toxic pollutants in produced water. The study showed flow-weighted oil and grease effluent concentrations averaging 89.8 mg/l. Priority organics present in significant amounts were benzene, bis (2-ethylhexyl) phthalate, ethylbenzene, naphthalene, phenol, toluene and 2,4-dimethylphenol. The proposed Offshore guidelines reported that produced water also contains priority metals, particularly cadmium, copper, lead, nickel, silver and zinc, as well as variable amounts of biocides, corrosion and scale inhibitors, emulsion breakers, treating chemicals (reverse emulsion breakers, coagulants, flocculants), antifoams and paraffin/asphaltine treating chemicals. In a study of OCS produced water routed to coastal areas

for treatment and discharge, Rabalais et al. (1989) listed 31 selected organic compounds in the produced water, including significant levels of benzene, toluene and phenol. Produced water from gas processing units may also utilize hydrate inhibition chemicals. The Region has concluded that the above offshore produced water characteristics will also apply to produced waters in the Coastal Subcategory.

A recent review (Avanti for EPA, April 18, 1992) of DMR's provided by LDEQ has indicated a list of 44 organic compounds and metals, including priority pollutants, are present in Coastal Subcategory produced water (see Table 2). It is assumed that the list of contaminants in produced water within the Coastal Subcategory will be similar in both Louisiana and Texas.

c. Derivation of BAT (BPT) permit requirements. In this discussion, oil and grease is being used as an indicator pollutant controlling the discharge of toxic pollutants under BAT. EPA considered, in the request for comments, Offshore guidelines (50 FR 34591, August 26, 1985) as well as the proposed Offshore guidelines (56 FR 10664, March 13, 1991), add-on technology to BPT for the removal of toxics and nonconventional pollutants under BAT. In these 1985 and 1991 actions, the Agency considered several add-on technology options for possible BAT control of toxics and priority pollutants. Most of these add-on treatment options are the same ones that were considered in deriving the BCT level of treatment for produced water. These options of carbon adsorption, biological treatment, chemical precipitation, granular filtration, membrane filtration, improved performance of BPT technology, and reinjection are discussed below.

(1) Carbon adsorption. In the 1985 above cited action, one BAT option the Agency considered was carbon adsorption as a BPT add-on to remove priority pollutants from produced water. This option was rejected in the 1985 action and again in the 1991 proposed Offshore guidelines because of the unknown effects that brines may exert on the adsorption process and because of the Agency's limited data on cost and performance data of this process. This BAT option is also being rejected for this Coastal Subcategory permit for the same reasons.

(2) Biological treatment. The 1985 guidelines action considered the BAT option of biological treatment as add-on technology to BPT; however it found severe problems with acclimating and maintaining biological cultures to treat

brine wastes. Additionally, this technology has not been tested with waters having total dissolved solids concentration levels encountered in produced water. The Agency rejected this option for the Offshore Subcategory, and the Region is also rejecting this option for this Coastal permit for the same reasons.

(3) *Chemical precipitation.* The 1985 and 1991 Offshore guidelines actions considered the BAT option of chemical precipitation as a possible add-on BPT technology for produced water. This technology can be useful in removing soluble metallic ions from solution by converting them to an insoluble form. Hydroxide precipitation and sulfide precipitation were found to remove virtually no zinc, the priority pollutant found in most samples, from BPT-treated produced water because of the low concentrations of the metal. The use of sulfide precipitation was found to be problematic due to sulfide gas generation, requirements for large settling facilities and problems with the disposal of large quantities of sludge generated by the process. The Agency rejected this option for Offshore guidelines, and the Region is also rejecting it for the Coastal permit.

(4) *Granular filtration.* In the 1985 and 1991 proposed Offshore guidelines actions, the Agency considered the BAT option of granular filtration as an add-on to BPT. The Agency rejected this option because most priority pollutants or metals contained in produced hydrocarbons and entrained in produced water are in solution or in a soluble form; therefore, no quantifiable reductions in these pollutants are obtained by granular filtration technology alone. For these reasons, the Region also is rejecting this option as being BAT for produced water.

(5) *Membrane filtration.* In the 1991 proposed Offshore guidelines, the Agency considered the BAT option of membrane filtration as an add-on to BAT for produced water facilities located 4 miles or less from shore. Membrane filtration technology is relatively new as applied to the oil industry; although, it has been applied to a number of other industries for some time. For example, membrane filters are used to separate oil, bacteria, solids and emulsified material from water in dairy, pharmaceutical and beverage industries. Although membrane filter technology can reduce oil and grease to concentrations of 13 mg/l daily maximum and 7 mg/l monthly average, the filter units require periodic chemical cleaning and blow down. There is a lack of data on filter characteristics and filter configurations needed to treat the

priority organic and metallic pollutants known to be present in produced water, as well as a lack of data on the levels of priority pollutants remaining after treatment with membrane filtration. In spite of these unknowns, the 1991 proposed Offshore Guidelines considered membrane filtration to be the preferred BAT option for produce water for facilities located 4 miles or less from shore. EPA has, however, reconsidered the use of membrane filtration as BAT for the Offshore Guidelines as a result of comments received on the 1991 proposal, and as a result of additional data obtained by EPA in April, 1991. For the Offshore Guidelines, EPA has found that membrane filtration is not technically available as a BAT treatment option at this time. The region is, therefore, rejecting the BAT option of membrane filtration as an add-on to BPT for these Coastal permits.

(6) *Improved performance of BPT technology.* As discussed previously in the BCT section of this Fact Sheet, EPA has reconsidered, based on additional data, the use of improved performance BPT (improved gas flotation) as BAT for produced water for the Offshore Guidelines. EPA has now found that improved performance BPT is economically and technologically achievable for Offshore Subcategory facilities.

Compared with the other BAT options, the most effective means of removing oil and gas industry produced water discharges of non-conventional and toxic pollutants to waters of the U.S. continues to be reinjection. As discussed below, the 1991 proposed Offshore Guidelines rejected produced water reinjection as BAT for Offshore facilities. As shown by the following discussion, the reasons given in the 1991 proposed Offshore Guidelines for not adopting reinjection as BAT are not applicable to the Coastal Subcategory areas of Texas and Louisiana.

(7) *Reinjection.* In the 1985 proposed Offshore guidelines action, EPA considered reinjection for all wells located in shallow waters as the preferred treatment option to define BAT. In this action, reinjection was found to be technologically feasible for meeting a zero discharge standard for platforms located in water depths of 20 meters or less. The Agency considered reinjection for all shallow water structures except for gas wells, which were found to discharge considerably less produced water (1/15 of oil well discharges). When EPA evaluated this reinjection option for all wells located in the Offshore Subcategory (sum of both shallow and deep water wells) the

Agency found reinjection to be technologically feasible and economically achievable for new sources but deferred a similar opinion regarding reinjection for existing wells because of lack of data and estimated cost (50 FR 34591). In considering zero discharge for new sources the Agency was prompted by studies which indicated injection would provide the most protection for environmentally sensitive marine areas. These factors prompted the Agency to consider variable depth limits and conditions which would allow for alternative onshore reinjection by an offshore facility.

In the 1991 proposed Offshore Guidelines, the Agency stated that while reinjection is generally technologically feasible in all offshore areas nation wide (i.e., suitable formations and conditions are available for disposal operations), some specific areas may experience problems in being able to inject due to formation characteristics or the proximity to seismically active areas. There were also concerns about higher air emissions and fuel use associated with the large pumps used to reinject fluids. The 1991 proposed Offshore Guidelines also stated that reinjection for all offshore wells nationwide would result in a 4.9% production loss.

The reasons given in the 1991 proposed Offshore Guidelines for not adopting reinjection as BAT are not applicable to the Coastal Subcategory areas of Texas and Louisiana. The Coastal Subcategory areas of Texas and Louisiana are not seismically active. Numerous geological studies have shown that there are ample numbers of injection horizons with favorable formation characteristics in the Coastal Subcategory areas of Texas and Louisiana.

In the 1985 proposed Offshore Guidelines, the Agency indicated that the additional energy requirements imposed by zero discharge are due primarily to the filtration and pumping of produced water into injection wells. It was found that there would be small incremental energy requirements for reinjection of produced water and this would not significantly affect the costs of pollution control nor measurably affect energy supplies. The 1985 action also found that when additional pumping is required, additional air emissions would be created due to the use of diesel or gas engines for generating power and this concern was reiterated in the 1991 proposed Offshore guidelines. In contrast to these findings for Offshore, power for reinjection from many Coastal Subcategory wells would be obtained from local power companies

or generated from power take-offs from existing equipment, with no significant increase in emissions from onsite-power generation.

The Region finds that reinjection of produced water in the Coastal Subcategory areas of Texas and Louisiana is technologically feasible. When compared with other BAT options, it is the most effective means of removing oil and gas industry discharges of non-conventional and toxic pollutants to waters of the U.S. These findings are supported by the Agency's proposed 1985 and 1991 proposed Offshore guidelines actions when the differences between Texas and Louisiana Coastal Subcategory areas and Offshore areas nationwide are considered. In addition, as discussed in section V of this Fact Sheet, about 6,400 of 7,600 oil and gas wells in Texas and about 1,660 of 1,960 oil and gas wells in Louisiana are already reinjecting their produced water.

d. BAT cost analysis for no discharge

The BAT cost analysis for the produced water no discharge requirement (Avanti, July, 1992. Economic Analysis—Produced Water) consists of three parts: The financial impact of compliance with the no discharge requirement on companies involved in Texas and Louisiana Coastal production, the impact of compliance with the no discharge requirement on loss of future oil production in Texas and Louisiana Coastal areas, and a cost effectiveness analysis.

(1) *Basis of analysis.* Since Louisiana State Regulation LAC:33,IX,7.708 (discussed fully in section VI.C.1.b of this Fact Sheet) prohibits the discharge of produced water to upland fresh waters after July, 1992, EPA assumed that the permit's BAT No Discharge requirement for those areas would have no further cost to companies and no incremental loss of future production.

Texas Statewide Rule 8 (discussed in section VI.C.1.c of this Fact Sheet) prohibits the discharge of produced water to inland and fresh waters in Texas. The BAT cost analysis, therefore, assumes that for those areas there will be no additional cost to companies and no additional loss of future reserves. For these analyses, it was assumed that all Texas waters inland from the Chapman Line are fresh. The State's prohibition on discharges of produced water to inland and fresh water areas was also factored into the cost effectiveness analysis.

As will be shown later in this Fact Sheet, one of the bases for requiring no discharge of produced water is that such discharges would violate water quality

standards in both Texas and Louisiana, and that such discharges in Texas would violate the Texas Hazardous Metals Regulation. The BAT cost analysis does not, however, assume compliance with state water quality standards and the Hazardous Metals Regulation (i.e., no discharge of produced water into state coastal waters), thereby making the cost estimate conservative.

(2) *Financial impact on companies.* Determining the potential financial impact of the BAT No Discharge requirement on Coastal Subcategory operators involved three steps. The first step was to identify the operators, their produced water discharge volume, and their financial characteristics. The second step was estimating compliance costs for each operator. The third step measuring compliance costs relative to short-run (working capital) and long-run (equity) financial measures.

(i) *Identification of Operators—* According to Louisiana Department of Environmental Quality and Texas Railroad Commission records, there are 101 companies operating in coastal waters of Louisiana and Texas that discharge into intermediate, brackish or saline waters. These companies discharge 350 million barrels of produced water annually. This discharge volume is distributed unevenly among operators. Fifty five per cent of the 101 companies discharge less than 1000 bbl/day with the average discharge among these companies being 950 bbl/day. Eighteen of the 101 companies discharge 90% of the total volume of produced water, and 10 of the 101 companies account for 80% of the total volume discharged. There are 27 of these 101 companies with publicly available information. These 27 companies, therefore, were used as the basis for the financial impact analysis which measured compliance cost relative to short-run and long-run financial measures. The 27 companies represent a mix of large and small companies and produced water dischargers. The range of asset size of the 27 companies is \$23 million to \$87 billion and the range of produced water discharge rates is 32,000 bbl/year to 59.5 million bbl/year. These 27 companies discharge 73% of the produced water volume discharged by the total 101 coastal companies.

(ii) *Compliance Cost to Operators—* Compliance costs of meeting the BAT produced water No Discharge requirement were calculated for each of the 101 companies operating in Louisiana and Texas coastal waters using estimated reinjection costs from Kerr Associates and the produced water

volumes from the above-noted State agency records. The Kerr study is a reevaluation of a produced water reinjection cost study by Walk, Haydel & Associates (1989) conducted for Mid-Continent Oil and Gas Association on the impact of Louisiana regulations on the oil industry. The Kerr study estimated after-tax cost of injecting a barrel of produced water using a new well (and assuming 75% capacity utilization). These costs are presented in Table 3. These costs are a refinement of the Walk, Haydel study and are somewhat lower; although, they do not reflect one of Kerr's major concerns of the Walk Haydel study that the pretreatment assumptions (filtration of the produced water prior to injection) represents an excessive cost. The Kerr study said that a more realistic pretreatment assumption, at considerably lower cost, would be the use of tank batteries to settle solids prior to injection. The cost of the filtration is still used in the Table 3 costs because of the lack of cost data on tank batteries. For this compliance cost analysis, it was assumed that most operators will use 3,000 bbl/day land-based (in Texas) or marsh-based (in Louisiana) wells for reinjection of produced water. It was assumed, however, that dischargers with the larger produced water volumes will use larger wells to capture available economies of scale. In this regard, the 5 largest dischargers in Texas are assumed to use 6,000 bbl/day land-based wells. In Louisiana, it was assumed that 7 large dischargers will use 9,000 bbl/day marsh-based wells and 3 other large dischargers will use 6,000 bbl/day marsh-based wells. In addition, 3 Louisiana operators in bays will use 9,000 bbl/day bay-based wells and 2 Louisiana operators in bays will use 6,000 bbl/day bay-based wells. These compliance costs represent, of course, a worst case scenario since it will not be necessary to drill all new injection wells. Instead, dry holes and abandoned wells can be used in a number of instances or the produced water can be used for secondary recovery projects in other instances. The results of this compliance cost analysis shows that the annual state wide pollution control cost for the Coastal BAT no discharge requirement is \$73.9 million in Louisiana and \$13.8 million in Texas.

(iii) *Compliance Cost Relative to Long-run and Short-run Financial Measures—* Measuring compliance costs relative to long-run (equity) and short-run (working capital) financial measures for the 27 companies used in the financial impact analysis showed a very small equity change, ranging from less

than 0.001% to 0.24%, as a result of the BAT No Discharge compliance costs.

The one exception was a company that had a 28% equity change. This company was an anomaly among the group used in the analysis in that it had the smallest assets of the 27 companies, but was one of the largest produced water dischargers among the total 101 companies. There was working capital information for 17 of the 27 companies. The analysis also showed a very small working capital change (0.001% to 3.1%) as a result of the BAT No Discharge requirement.

(3) *Impact on loss of future production.* This analysis estimates the oil production lost (oil not produced) because of the added cost of complying with BAT produced water No Discharge requirements. At some point in the life of every field, the cost of producing the oil will become greater than the profits to be made from producing it. The cost of complying with the BAT No Discharge requirements may, therefore, cause this point to be arrived at sooner, shortening the life of the field. This may result in more oil being left in the formation than would be the case if there were no additional cost of complying with BAT.

This analysis was performed for 36 Coastal Subcategory fields in Louisiana. These fields were selected because there was available data both on produced water discharge rates and produced oil rates for these fields. Although there was produced water discharge information for all of the Louisiana Coastal fields there was produced oil rate information on only part of them. These 36 fields (4 bay fields and 32 marsh fields) discharge 59.5 million bbl/year of produced water, which is 19.6% of the produced water discharged to coastal Louisiana. These fields represent a variety of fields in bays and marshes, and are representative of the types of Coastal Subcategory wells in Louisiana and Texas. The water-oil ratios for these fields range from .04 to 24.4, the produced water discharge rates range from 7,300 bbl/year to 15.1 million bbl/year, and the energy production rates range from 8,700 bbl of oil equivalent (BOE) per year to 4.25 million BOE/year.

The oil production loss analysis estimates the amount of recoverable oil production from the field without the additional cost of BAT No Discharge compliance, and subtracts from it the estimated amount of recoverable oil production with the additional BAT compliance cost. To determine the amount of recoverable oil without the additional compliance cost it is necessary to know what the total

remaining recoverable reserves are for the field; that is, where the field is in its production life. That information was not available for the 36 fields used in this analysis. The amount of recoverable oil production was, therefore, estimated by using recent oil production rates and assuming a constant 15% oil production decline rate for each of the fields.

Other factors involved in the analysis are oil prices, oil production costs, BAT compliance costs, and tax rates. All of these factors were assumed to remain constant throughout the production life of the field. The price of oil was projected to be \$21 per bbl. Oil production costs, excluding the produced water reinjection costs, was based on "Costs and Indices for Domestic Oil and Gas Field Equipment and Production Operations 1987, 1988, 1989" published by the Energy Information Administration (EIA). Production costs were scaled down from EIA's cost estimates for a 12-slot Gulf of Mexico platform. Costs for three model oil production facility sizes were developed. The largest model facility (used to analyze the large bay fields) was scaled down to approximately 1/4 of the Gulf-12 platform cost. The intermediate size facility (used for small bay and large marsh fields) was assumed to be 1/2 of this largest model facility's cost. The small size production facility (used for small marsh fields) was assumed to be 1/4 of this largest model facility's cost. These production costs are presented in Table 4. A field may contain both large and small production facilities. The number and size of production facilities in each of the 36 fields was approximated from information on the number and size of their produced water outfalls. A very conservative BAT compliance cost was assumed to be \$0.41/bbl (Table 3). This compliance cost is conservative because it is based on the cost for a small, marsh-based injection well with no allowance for economy of scale, use of produced water for secondary recovery or use of abandoned wells. A combined state and local tax rate of 38.5% was used.

The production loss analysis for the 36 Louisiana fields showed that the average loss of oil production for these fields due to the cost of complying with BAT (reinjection of the produced water) was 8.2 percent of the estimated coastal oil production without this compliance cost. It is reasonable to assume that the same percent loss of estimated oil production would occur in coastal Texas fields, because similar geological conditions occur in both state coastal areas. It should be noted that this estimated percentage loss of oil

production is not meant to represent the percent loss of oil production for all coastal oil production facilities covered by these permits. Such a percentage production loss, if the information was available to calculate it, would be much lower, since the produced water BAT requirement of No Discharge does not have an additional compliance cost to production facilities that might potentially discharge to fresh waters in Texas and to fresh waters in Louisiana. Such produced water discharges are already prohibited by state rules or regulations described in sections VI.C.1.b and c of this Fact Sheet. It should also be noted that for Louisiana production facilities currently discharging to intermediate, brackish and saline waters (except possibly large bays) the BAT requirement would have only a small impact, since they will have to cease discharge by January, 1997 anyway (see section VI.C.1.b of this Fact Sheet).

(4) *Cost effectiveness analysis.* The cost effectiveness analysis estimates the cost of pollution control per pound equivalent (PE) removed annually. This cost is then compared with the cost per PE for BAT requirements for other industries. Pollutant PE's are calculated to represent a weighted quantity of pollutants that would have entered the environment without the proposed regulations or permits. PE's are calculated by multiplying each pollutant concentration by the annual volume of produced water discharged and by a weighing factor that puts each pollutant quantity on an equivalent scale by accounting for varying degrees of toxicity. For example, a pound of radium is considered more toxic than a pound of silver; therefore, the toxic weighing factor for radium is higher. The toxic weighing factors are based on a methodology that uses human health and aquatic life criteria developed by EPA (Quality Criteria for Water, 1986) for each pollutant. For these permits, marine toxic weighing factors were used (resulting in a higher cost/PE) since the receiving waters for which there will be an additional compliance cost due to these permits will be mainly marine or estuarine. The complete methodology and derivation of the toxic weighing factors used for this analysis are presented in Verser (1992).

The BAT cost per PE for these permits, as well as those for a number of other industries, is listed in Table 5. The cost per PE for these permits were calculated by multiplying the cost of disposal (from section d.(1), above) by the total volume of produced water for coastal Texas and Louisiana and divided by the total PE. These costs per

PE represent a worst case, in that they used the disposal costs for small injection wells (highest cost/bbl) with no allowance for economy of scale, use of produced water for secondary recovery or use of abandoned wells. The comparison with BAT cost per PE for these permits with BAT guidelines for other industries shows that the BAT cost for these permits is among the lowest of the BAT costs for various industries.

(5) *Summary of BAT cost analysis for No Discharge.* As demonstrated above, the BAT No Discharge of produced water requirement in these proposed permits is economically achievable. The financial impact of compliance with the No Discharge requirement on most companies involved in Texas and Louisiana Coastal production is minimal. The estimated loss of production due to compliance with the No Discharge requirement is small compared with total coastal production. In addition, a comparison of the cost effectiveness of BAT (No Discharge) for these permits with BAT for other industries shows the No Discharge requirement to be among the lowest BAT costs per pound equivalent for any of these industries.

e. BAT option selection

The Region has selected reinjection of produced water as the appropriate BAT effluent control for toxic and nonconventional pollutants in these Coastal Subcategory permits. The above review indicated that the other add-on technologies to BPT provide for less removal of these pollutants from produced water than does reinjection. Reinjection provides total removal from Waters of the U.S. in Louisiana and Texas of non-conventional and toxic pollutants due to produced water discharge. In addition, the reinjection is shown, as discussed above, to be technologically available and economically achievable.

2. Produced Sand

As explained in the following pages, BAT for produced sand is no discharge.

a. Derivation of BAT (BPJ) permit requirements

As stated previously in section VI.A.2 of this Fact Sheet there are no promulgated guidelines for produced sand discharges. Currently, produced sands are either transported to waste disposal sites onshore, or washed with either water or solvent and then discharged. Other than the water or solvent washing of produced sand or its disposal in waste disposal sites, the Agency is unaware of any other feasible

technology capable of routinely cleaning produced sand except for a system developed by Shell Oil Company (comments from Shell Oil Company to EPA on proposed rule, Offshore Guidelines, 56 FR 10664, March 13, 1991). The Shell system is reported to have reduced the oil content of produced sand to 5% to 0%, but this system is only a prototype system, untried by and may be unavailable to the industry in general.

b. Selection of "No Discharge" BAT limitation

Using BPJ, the Region has selected a BAT "no discharge" requirement for produced sand as the most effective means of controlling the discharge of nonconventional and toxic pollutants into waters of the U.S. The prohibition on discharges of produced sand in the Coastal Subcategory areas of Texas and Louisiana is technologically feasible, and in the following section is shown to be economically achievable.

c. BAT cost evaluation of produced sand

The BAT cost evaluation for no discharge of produced sand consists of two parts: A calculation of the average compliance cost per facility and a cost effectiveness analysis.

As will be shown later in this Fact Sheet, the discharge of produced sand would be in violation of the General Criteria of the Louisiana Water Quality Standards. The BAT cost analysis does not, however, assume compliance with these General Criteria (i.e., no discharge of produced sand to Louisiana coastal waters), thereby making the cost estimate conservative.

(1) *Compliance cost analysis.* The volume of produced sand generated in the coastal subcategory is not well documented. The volume of sand requiring disposal was estimated using a database developed by the Offshore Operators Committee (OOC) and submitted to the EPA for the development of Offshore Guidelines (OOC, 1991). According to the database, the total volume of produced sand generated in a twelve-month period is 41,627 bbls. The produced water associated with this volume of sand is 309,631,000 bbls. This is an average of 7440 bbls of water per bbl of sand. The region estimates that a similar ratio applies to Coastal Subcategory producing facilities.

The volume of produced water generated in the coastal subcategory is 304,312,000 per year in Louisiana and 218,075,000 bbls per year in Texas (Avanti, April 18, 1992). Using the average volume of produced sand per

barrel of produced water that was derived from the OOC's offshore data, the volume of produced sand requiring disposal under the proposed general permits approximates 41,000 bbls per year in Louisiana and 29,000 bbls per year in Texas.

The OOC states that produced sand often is handled like cuttings in that it is sent for disposal as nonhazardous oil field waste under state regulations. Walk, Haydel & Associates (1989) provides disposal costs for oil field wastes as \$9.86/bbl of cuttings on the Gulf of Mexico coast. This cost includes barging costs for offshore facilities at \$1.50/bbl to \$2.00/bbl. The use of costs for cuttings disposal from offshore for estimating the disposal cost of produced sand in coastal areas results in an inflated cost for produced sand. For one thing, the transportation (barging) costs for produced sand will be minimal at most. Nevertheless, based on a high estimate of \$10.00/bbl for disposal of produced sand (which includes barging costs), the total annual costs for disposal of produced sand under the proposed general permits are \$409,000 for Louisiana and \$293,000 for Texas. This is an average annual cost per facility of only \$1,800 in Louisiana and \$1,850 for Texas.

(2) *Cost effectiveness analysis.* A cost effectiveness test estimates the cost of pollution control per pound equivalent removed. Pollutant pound equivalents (PE) are calculated to represent a weighted quantity of pollutants that would have entered the environment without the proposed permits. PE's are calculated by multiplying the pollutant concentration by a weighing factor that puts each pollutant quantity on an equivalent scale by accounting for varying degrees of toxicity using copper as the standard. For example, because a pound of radium is considered more toxic than a pound of silver, the toxic weighing factor for radium is higher. The toxic weighing factors are calculated based on a methodology that uses human health and aquatic life criteria developed by EPA for each pollutant. The complete methodology and derivation of the toxic weighing factor used for this analysis are presented in Versar (1992).

For produced sand, pollutant concentration data were available only for radium. The radium concentration of produced sand was derived from two data sources. The first data source is the OOC's produced sand database submitted in response to the proposed Offshore Guidelines (OOC, 1991). The database includes ²²⁶Ra and ²²⁸Ra concentrations for 19 produced sand samples collected by member

companies from offshore facilities. The second data source was submitted by Shell Offshore Inc. also for the effluent guidelines effort (Shell Offshore Inc., 1991). The 29 samples reported by Shell Offshore were taken as part of a monitoring study for a produced sand treatment technology (Continental Shelf Associates, 1991). A data set of the combined results of these two studies produces average concentrations of 37 pCi/g ^{226}Ra (range of 0 pCi/g to 172 pCi/g) and 37 pCi/g ^{228}Ra (range of 0 pCi/g to 180 pCi/g) for 48 produced sand samples.

In the calculation of PE's for the No Discharge requirement of produced sand (Avanti, June, 1992), the Region made the reasonable assumption that the produced sand Radium concentrations offshore will be similar to those of the Coastal area since produced sands are derived from similar geological formations. The total pound equivalents for both ^{226}Ra and ^{228}Ra are divided by the total cost of compliance for each state. The resultant removal cost per pound equivalent of ^{226}Ra and ^{228}Ra is \$106 for both Louisiana and Texas.

(3) Summary, BAT cost analysis for produced sand

Because the average cost of disposal per facility for produced sand are minimal (approximately \$1,800 per facility), analyses of specific companies were not conducted. This disposal cost per facility represents a high-end estimate of the total costs. The cost appears to be reasonable and acceptable for waste disposal under BAT.

The cost effectiveness results are compared to the cost effectiveness of previous rule makings in Table 5. This Table shows a range of cost per pound equivalent from \$0 to \$404 (In 1981 \$) for a number of promulgated BAT industry guidelines. For these Coastal permits the cost is \$106 (\$71 in 1981 \$) per pound equivalent.

The cost of produced sand removal falls below the middle of the range of costs. This analysis considered only radium in calculating cost effectiveness because of a lack of data on other pollutants occurring in produced sand. For example, limited data on oil and grease concentrations show levels at or around 1 mg/l (Continental Shelf Associates, 1991). Thus organic priority pollutants are almost certain to be found in produced sand. If these organic pollutants were added to this cost effectiveness analysis, costs per pound equivalent would be lower. With the present analysis the cost appears to be within the acceptable range of costs per pound of pollutant removed, and is

considered a reasonable BAT cost of permit compliance.

C. State Rules and Regulations, and State Water Quality Standards

EPA is required under 40 CFR 122.44(d) to include conditions as necessary to achieve State requirements and water quality standards as established under section 303 of the Clean Water Act. Discussed below are produced water characteristics, State rules and regulations that apply to produced water, and the produced water requirements based on State Water Quality Standards. Then produced sand characteristics and produced sand requirements based on State Water Quality Standards are discussed.

1. Produced Water

a. *Characteristics of produced water as related to water quality standards and regulations.* The pollutants contained in produced water have been generally categorized as including oil and grease, dispersed and dissolved hydrocarbons and entrained priority pollutants, heavy metals, treating chemicals and, to varying degrees, radionuclides.

(1) *Volume.* Boesch and Rabalais (1989) have estimated that 1,952,386 barrels of produced water are discharged daily into all Louisiana State waters. This figure was recently revised to 1,954,049 barrels daily by MMS (MMS 91-004). Boesch and Rabalais (1989), also estimated that 23% of this produced water is discharged into fresh water areas, 22% into brackish water areas, 17% into saline areas and 28% into open bay areas. The remaining 10% is derived from offshore.

EPA has recently completed a reevaluation of volumes of produced water discharged to Coastal Subcategory areas of Louisiana and Texas (Bowler & Petrazzuollo to EPA, March 17, 1992). This report, based on a review of Louisiana Department of Environmental Quality (LDEQ) and the Railroad Commission of Texas (TRC) discharge monitoring reports (DMR's), indicates that a total produced water discharges to coastal areas of 1.4 million barrels per day. Due to the large volumes of produced water involved, and because these water volumes can be expected to increase in time with the aging of the producing fields, continued discharges and the environmental impact of produced water on these shallow water environments is viewed with concern.

(2) *Characteristics.* Produced waters are usually of greater salinity than normal sea water (35 ppt), and range from 3 ppt in some restricted areas to

300 ppt (Rittenhouse et al. 1969). In coastal produced waters, MMS (MMS 91-0004) reported salinity ranges of 43 to 192 ppt and Boesch and Rabalais (MMS 89-0031) reported 50 to 150 ppt. While the salinity of brines can have severe negative effects on local biological communities, produced waters also contain relatively high concentrations of organic compounds including entrained volatile aromatic hydrocarbons (VAH's), alkanes, metals and, to varying degrees, radionuclides (NORM). Some VAH's (benzene, ethylbenzene, Toluene), as well as oil and grease, TOC, TSS, pH, temperature, chlorides, dissolved oxygen, and toxicity are limited by state regulations.

A 30 platform Gulf of Mexico offshore study by Burns and Roe (for EPA, 1982) reported average effluent concentrations for VAH's at 2.4 mg/l for benzene, .263 mg/l for ethylbenzene and 2.6 mg/l for toluene; phenol average concentrations are reported at 2.1 mg/l. Priority pollutants, in addition to the preceding, contain significant amounts of bis (2-ethylhexyl) phthalate, naphthalene. One would expect similar values for produced waters would be exhibited by facilities in the Coastal Subcategory areas of Texas and Louisiana. Indeed, MMS (MMS 91-0004) reports some VAH Louisiana coastal area concentrations exceed 5 mg/l and some effluents exhibit similar phenol concentrations. Rabalais et al. (1989) have listed 31 organic compounds in produced water, including those indicated above. The report also indicates that produced waters exhibit concentrations of 10 to 100 mg/l aliphatic fatty acids, approximately 1 to 35 mg/l aromatic acids and up to 35 mg/l saturated hydrocarbons. Rabalais (1990) and St. Pe et al. (1990), also report that toxic metals are present in produced waters with nickel, vanadium and barium in the highest concentrations with zinc, copper and chromium also being present in most discharges. EPA indicated (proposed Offshore guidelines, March 13, 1991) that produced water contains significant concentrations of priority metals, particularly cadmium, copper, lead, nickel, silver and zinc. Additionally, produced water was also found to contain variable amounts of biocides, corrosion and scale inhibitors, emulsion breaker, treating chemicals, antifoams, paraffine/asphaltine treating chemicals, and possibly anhydrate inhibition chemicals.

Concentrations of NORM (Ra-226, Ra-228) in coastal waters have been found to have wide variability related to geography and oil type. Studies have reported NORM levels ranging from 605

to 1,215 pCi/l (Proposed Offshore guideline, March 13, 1991). Schlenker and St. Pe (1990) report Radium 226 contents in produced waters that range from 131 to 393 pCi/l. An LDEQ study of state waters (primarily coastal areas) has found that Ra-226 and R-228 occur primarily in the soluble phase and data from approximately 450 discharging sites indicate that produced water from half of these sites exceeds 300 pCi/l. The data reported by a recent MMS study (OCS Study, MMS 91-001) indicates that produced waters sampled in the Louisiana coastal area (Coastal Subcategory as well as Territorial Seas portion of the Offshore Subcategory) had 136.8 to 1040 pCi/l with increases in radioactivity linked to increases in salinity.

(3) *Fate and environmental impact of produced water.* In the past, produced water has been discharged into Coastal Subcategory waters. Although much has been written on the environmental effects of discharges of these waters over the years, the attempt here will only be to review updated syntheses of some of the more significant data sets. Boesch and Rabalais (1989) indicated that contamination caused by discharges of dense water plumes (brines) extends beyond the region in which acutely lethal concentrations of contaminants were expected to be found. MMS (MMS 91-0001-4) has reported that some of the pollutants in discharges of produced water in coastal and open bay areas had a persistent effect on benthic communities and have had a resistance to degradation. These conclusions also reflect the views of others (e.g., Daniels and Means, 1989; Rabalais, 1991; Rabalais, et al., 1989; St. Pe et al., 1990), with St. Pe et al. concluding that continued produced water discharges into the shallow water, low energy, unique hydrological inner coastal environments will likely result in an increase in both the level and extent of conventional and nonconventional pollutant contamination in areas of the discharges. In support of these claims, Rabalais (1991) indicated that the largest component of the organic load of produced water is the fatty acids and aromatic acids. Saturated hydrocarbons were found to be the next most abundant. Volatiles and phenols comprise the third most abundant class of pollutants present in produced water with benzene and toluene comprising 75% to 85% of these compounds. These compounds, although water soluble and easily dispersed within the water column, are acutely toxic to organisms in high concentrations. Polynuclear aromatic hydrocarbons (PAH's)

constitute the smallest fraction of organic pollutants found in produced water. PAH's, however, are the heaviest, most toxic and environmentally stable component in produced water and are most likely to be accumulated in sediments of the discharge area.

St. Pe et al. (1991) indicated that the factors determining the degree of impact of produced water upon the environment is related to discharge rate (amount), quantity of pollutants and trace metals present in the produced water, local hydrology, sediment disruption (dredging activities, etc.) and sediment type (especially organic content and texture). As in the case of produced water discharges into Coastal Subcategory areas, dense water plumes will tend to have cumulative long term environmental effects due to the low energy, low mass exchange waters which typify areas in the Coastal Subcategory. The chemicals and trace metals found within produced waters discharged into these coastal areas have been judged to have both a potential ecological as well as human health risk (Daniels and Means, 1989).

(4) *Biological Toxicity.* St. Pe et al. (1991) report a mean LC₅₀ 96-hour mysid shrimp acute toxicity from produced water at four sites in the Louisiana coastal area at 4.3% with the range of LC₅₀'s being 2.6% to 5.8% of the effluent. Sheepshead 96-hour LC₅₀ acute toxicity tests yield a mean value of 20.1%, with a range of 7.2% to 33.8% of the effluent. Utilizing the Agency's method of determining an equivalent chronic toxicity value from acute values by means of acute/chronic ratios (EPA/505/2-90-001, p.18), the sheepshead chronic toxicity range reported by St. Pe et al. as indicated above is equivalent to chronic values of .72% and 3.38% of effluents. St. Pe et al. also ran the 96 hour acute test on elutriates from sediments in the area which indicated a 73.3% mortality of the test organism *Hyalella azteca*. In a separate study, Enviro-Lab, Inc., conducted biological acute and chronic toxicity tests on produced water from West Delta Block 52 facility, Plaquemines Parish, Louisiana for L.G.S. Exploration, Harvey, Louisiana. Enviro-Lab's 7-day chronic test of no observable effect concentration (NOEC), Utilizing *Mysidopsis* and *Cyprinodon*, indicated the following: *Mysidopsis* survival, growth and fecundity to be, respectively, 2.875%, 1.437% and 2.875% effluent, *Cyprinodon* survival at 1.437% effluent and growth value of <1.437% effluent. The 96-hour acute lethality LC₅₀ tests for *Mysidopsis* were 5.8% to 15.8% effluent and for *Cyprinodon* were 1.5% to 8.1% effluent.

Boesch and Rabalais (1989) also indicated that produced water assays on crustaceans had LC₅₀'s of less than 10% produced water. Additionally, Rose and Ward (1981) indicated that shrimp larvae LC₅₀'s were less than 1% produced water.

Produced water toxicity data from offshore wells was submitted in October, 1992 by the Offshore Operators Committee to the Region. These data showed that the produced water was highly toxic. Seven-day chronic survival data from one company showed a mean NOEC survival for mysids of 0.86% effluent (with a minimum of 0.32% and a maximum of 1.86% effluent) and a mean NOEC survival for sheepshead minnows of 1.0% effluent (with a minimum of 0.26% and a maximum of 2.7% effluent). Seven-day chronic survival data from another company showed a mean NOEC survival for mysids of 0.95% effluent (with a minimum of <0.1% and a maximum of 5% effluent).

The largest produced water toxicity data base (Avanti, 1992) used in these permits consists of self-monitoring compliance data required by Louisiana Department of Environmental Quality discharge permits. The data base has results from 241 96-hr LC₅₀ tests using mysids, 239 96-hr LC₅₀ tests using sheepshead minnows, 228 chronic toxicity tests using mysids and 223 chronic tests using sheepshead minnows. The 96-hr LC₅₀ mysids tests had a mean of 12% effluent and a 95 percentile value of 1.3% effluent. The 96-hr LC₅₀ sheepshead minnow tests had a mean of 27% effluent and a 95 percentile value of 2.7%. For the chronic toxicity tests, the mysid survival mean value was 4.5% effluent and the 95 percentile value was 0.2%. The sheepshead minnow survival mean value was 8% effluent and the 95 percentile value was 0.5%. The toxicity tests summarized in this Section indicate that discharges of produced waters from coastal facilities are sufficiently toxic that their discharges into Coastal Subcategory water is of great concern and, as discussed later in this Fact Sheet, water quality standards will not be met if their discharge is allowed.

b. *Louisiana state regulations for produced water discharges.* (1) *Discharge to fresh water.* Louisiana State Regulation LAC:33, IX, 7.708 prohibits discharges of produced water to fresh water areas characterized as "upland" after July 1, 1992. The Regulation defines "upland" as "any land not normally inundated with water and that would not, under normal circumstances, be characterized as swamp or fresh,

intermediate, brackish or saline marsh" and states "the land and water bottoms of all parishes north of the nine parishes contiguous with the Gulf of Mexico will be considered in toto as upland areas." This Regulation does, however, allow discharge to a major deltaic pass of the Mississippi River or to the Atchafalaya River, including Wax Lake Outlet, below Morgan City, if the discharge has been authorized by a State permit.

(2) *Discharges to intermediate, brackish or saline waters.* This same Regulation (LAC 33:IX.7.708) addresses the discharge of produced water into intermediate, brackish or saline waters inland of the inner boundary of the Territorial Seas by requiring that either discharges cease, or comply with a specific set of effluent limits. Allowance is made for a schedule to either cease discharge or comply with the limitations. The schedule will be based on the number of discharges (one to three or more) an operator may have. An operator with three or more discharges of produced water must be in compliance with one-third of the discharges by January 1, 1993, two-thirds by 1994 and be in full compliance by January 1, 1995. Operators with no more than two discharges must be in compliance by January 1, 1995, and operators with a single discharge must be in compliance by January 1, 1994. In addition, facilities with produced water discharges of 250 barrels a day or less and a maximum oil production of 100 barrels per day, or the monetary equivalent of gas, have an additional year to comply with the above requirements. In any event, discharges must be either eliminated or be in compliance by January 1, 1997. The Regulation does, however, allow dischargers to certain open bays the opportunity to show, on a case-by-case basis, that their discharge should be exempt from these Regulations. Specifically, "Operators discharging to the open waters and at least one mile from any shoreline in Chandeleur Sound, Breton Sound, Barataria Bay, Caminada Bay, Timbalier Bay, Terrebonne Bay, East Cote Blanche Bay, West Cote Blanche Bay, or Vermilion Bay from production originating in these areas will have two years after the effective date of these regulations or one year after completion of the U.S. Department of Energy's (DOE) study concerning Louisiana coastal bays, whichever comes first, to show on a case-by-case basis that their particular discharge should be exempt from these regulations, if the DOE study, after scientific peer review, shows minimal acceptable environmental impacts."

The above noted produced water effluent limits for daily maximum undiluted effluent concentrations, in mg/l, allowed are: Benzene, .0125; ethylbenzene, 4.380; toluene, .475; oil and grease, 15; total organic carbon, 50; total suspended solids, 45; dissolved oxygen 4.0 (minimum). In addition, the Regulation requires the effluent to have no visible sheen, a pH of 6-9 standard units, chloride dilution ratios of 1:10 with ambient waters, and soluble radium at no more than 80 picocuries per liter. The Regulation also requires that discharges meet acute and chronic toxicity limits of one toxicity unit (TU).

Produced water is not expected to meet the limitations required for discharges to intermediate, brackish and saline water areas inland of the territorial seas. Louisiana State permit DMR data for produced water shows that the Regulation's limits for benzene, toluene, Radium 226 and 228, as well as the acute and chronic toxicity limits of 1.0 TU will be violated (see Table 6). The Region is, therefore, requiring no discharge of produced water into these areas on the basis that these discharges will be prohibited by, or unable to meet the requirements of, the Louisiana Regulation 33:IX.7.708. In addition, the Region is requiring no discharge of produced water into fresh water upland areas, since the Louisiana Produced Water Regulation prohibits the discharge of produced water into fresh water upland areas after July 1, 1992. The Region is not using this Louisiana Regulation as a basis for "no discharge" to the above discussed waters of major deltaic passes of the Mississippi River or Atchafalaya River, and to the areas of open bays subject to the case-by-case exemption from this Regulation.

c. *Texas rules for produced water discharges.* Statewide Rule 77(d)(3) (16 TAC § 3.75) states that no permit may be issued when the discharge will cause violation of water quality standards. Statewide Rule 8(b) states that no person subject to regulation by the Railroad Commission of Texas may cause or allow pollution of classified surface waters of the state, while Rule 8(e)(1,2, and 4) charges that (1) operators shall not pollute waters of the Texas offshore and adjacent estuarine waters as well as inland and fresh waters or damage the aquatic life therein and (2) operations are to be conducted in such a manner to preclude the pollution of the waters of the offshore and adjacent estuarine zones as well as inland and fresh waters. This Rule is interpreted by the State as prohibiting the discharge of produced water to inland and fresh waters of the State of Texas. The Region is using this Rule as

an additional basis for requiring no discharge of produced water to inland and fresh waters of the State of Texas.

d. *Louisiana water quality standards.* The Louisiana Water Quality Standards (LAC 33:IX.11) contain narrative and specific numerical criteria for listed water bodies according to their designated uses. Unlisted water body designated uses are determined by the uses listed for the water body to which the unlisted water body is a tributary or distributary.

(1) *Narrative standards.* LAC 33:IX.1113(B)(5) states that no substances shall be present in the waters of the state or the sediments underlying said waters in quantities that alone or in combination will be toxic to human, plant, or animal life or significantly increase health risks due to exposure to the substances or consumption of contaminated fish or other aquatic life. Region 6 has interpreted (EPA letter to LDEQ dated 12/6/90) this narrative to require no chronic toxicity at the edge of the mixing zone, and no acute toxicity at the edge of the Zone of Initial Dilution (ZID).

(2) *Numerical criteria.* LAC 33:IX.1113(C) states the Numerical Criteria identified in the Numerical Criteria Table I apply to the specified water bodies, and to their tributaries, distributaries, and interconnected streams and water bodies if they are not specifically named therein. The implementing procedures are spelled out in the EPA letter to LDEQ dated 12/6/90.

(3) *Mixing zones.* The mixing zones established in the Louisiana Water Quality Standards are: 200 foot radius for coastal bays and lakes. These mixing zones are used for both aquatic life and human health protection.

(4) *Modeling of produced water discharges.* Dispersion modeling was done to determine whether produced water discharges will violate Louisiana Water Quality Standards Numeric Criteria for Toxic Substances (LAC33:IX.1113(C)(6)), or General Criteria for Toxic Substances (LAC33:IX.1113(B)(5)). The dispersion model used was the CORMIX 1 model. The model was run using a water depth of 3 meters. This is a reasonable estimate of the greatest depth of bays in Louisiana. This modeling will approximate the dispersion for produced water discharges into open bays in the Coastal Subcategory areas of Louisiana waters. It represents a reasonable case of the most dilution to be found in Louisiana Coastal Subcategory waters. It will, therefore, be assumed that if the discharge of produced water in this scenario will

cause a violation of a numeric or general Water Quality Standard, then a produced water discharge will cause a violation of that Standard in any of the Louisiana Coastal Subcategory waters.

The modeling was done using two produced water discharge rates: the average discharge rate (3363 bbl/day) from Louisiana state permit compliance data for coastal facilities, and the median discharge rate (813 bbl/day) from the same data set. The average produced water effluent concentrations for the various pollutants was also from this Louisiana data base. The comparison of the produced water pollutants at this appropriate mixing zone with the Water Quality Standards' Numeric Criteria is shown in Tables 7-A and 7-B, and summarized below.

Using the average discharge rate and the average effluent concentrations, Table 7-a shows that the Numeric Marine Acute Criteria for Copper, Lead, Mercury, Nickel and Zinc will be violated at the edge of the ZID. The Marine Chronic Criteria for the same pollutants, plus Arsenic, were also violated at the edge of the mixing zone. In addition, the Human Health Criteria for Benzene was violated at the edge of the mixing zone.

Using the median discharge rate and the average effluent concentration, Table 7-a shows that the Numeric Marine Acute Criteria for Copper, Lead, Mercury and Nickel were violated at the edge of the ZID. The Marine Chronic Criteria for these same pollutants were violated at the edge of the mixing zone. In addition, the Human Health Standards for Benzene was violated at the edge of the mixing zone. Table 7-b shows that the violations were very significant for Lead, Mercury, Nickel and, for human health, Benzene, even when using the median discharge rate.

Using the median discharge rate and the median effluent concentrations, Table 7-b shows that there were still significant violations of the Numeric Standards. The Marine Acute and Chronic Criteria for Copper were violated, as were the Marine Chronic Criteria for Lead, Mercury and Nickel. In addition, the Human Health Criteria for Benzene was violated.

Tables 7-A and 7-B show that the Narrative Water Quality Standards will also be violated. The same scenarios were used as for the comparison with the Numeric Criteria. Produced water chronic toxicity data was taken from the Louisiana State Permit Discharge Monitoring Report data base. In order for the Narrative Criteria to be met, the effluent, when diluted to 13.3% (the concentration at the edge of the mixing zone using the mean discharge rate)

must not exhibit chronic toxicity. If the produced water shows chronic toxicity at a lower percent effluent, this would be a violation of the Criteria. The chronic toxicity data, using lethality only, show that 95.6% of the 226 mysid tests and 85% of the 221 Sheepshead minnow tests violate the Criteria at the edge of the mixing zone when the mean discharge rate was used. Even when using the median discharge rate, where 6.6% effluent must not be toxic, the chronic lethality data show that 85% of the mysid tests and 63% of the Sheepshead minnow tests violate the criteria at the edge of the mixing zone.

In summary, the large body of produced water effluent data shows that allowing the discharge of produced water, even in the case providing the most dilution in Louisiana coastal waters, would cause substantial violations of the Louisiana Water Quality Standards Numeric and Narrative Criteria. This finding forms yet another basis for the permit requirement of No Discharge for produced water.

e. Texas water quality standards
Texas Water Quality Standards (31 TAC §§ 307.2-307.10) include specific numerical criterion values for specific pollutants and narrative standards for the purpose of enhancing or maintaining water quality and to provide for and fully protect waters of the state. The standards assign numerical limits to classified water bodies on the basis of their State designated use.

The implementing procedures are spelled out in a letter entitled "Implementation Document for the Revised Water Quality Standards", addressed to EPA from the Texas Water Commission, dated 11/20/1991 and "Implementation of the Texas Water Commission Standards via Permitting", dated February, 1992.

(1) *Narrative standards:* 31 TAC § 307.6(b) states that waters of the state shall not be acutely toxic to aquatic life except in small zones of initial dilution at discharge points. Waters in the state with designated or existing uses shall not be chronically toxic to aquatic life, except in mixing zones and below critical low flow conditions.

(2) *Numerical criteria:* Numerical criteria for waters of the state are established (31 TAC §§ 307.2-307.10) for specific toxic substances and are identified in Tables 1 and 3 at § 307.6.

(3) *LC50 acute toxicity effluent standard.* Section 307.6(e)(2)(B) of the Texas Water Quality Standards requires that effluent discharges shall not be acutely lethal to representative species of aquatic life as demonstrated by tests

on 100% effluent. Criterion for lethality shall be mortality of 50% or more of the test organisms after 24 hours of exposure. This means that a 24-hr LC50 of less than 100% effluent will be in violation of this Water Quality Standard Requirement.

The Region has obtained toxicity data on produced water at coastal facilities from the Louisiana Department of Environmental Quality (LDEQ). This data was generated as a permit compliance requirement for a number of LDEQ-issued produced water discharge permits. The data being used are for discharges into Louisiana State waters (including the territorial seas). The data set includes 241 acute 96-hr LC50 tests for mysids, and 239 acute 96-hr LC50 tests for sheepshead minnows. In addition, the data set includes 226 chronic survival tests for mysids and 221 chronic survival tests for sheepshead minnows. The Agency assumes that the toxicity of produced water from the Coastal Subcategory areas of Texas will be the same or very similar to the toxicity of produced water from the Coastal Subcategory areas of Louisiana.

From the 96-hr LC50 acute tests, information on the lethality after 24 hours was obtained to generate a 24-hr LC50 data set (Avanti, June, 1992). An analysis of the 223 24-hr LC50 generated data points for mysids and 226 24-hr LC50 generated data points for sheepshead minnows shows that at least 88%, and as high as 94%, of the mysid tests, and at least 30%, and as high as 91%, of the sheepshead minnow tests failed to achieve the Texas Water Quality Standards requirement of a 24-hr LC50. These data were from diluted samples, not 100% effluent, which means that if this 24-hr LC50 generated data was for 100% effluent, the exceedance of this water quality standard (24-hr LC50 in 100% effluent) would have been even more significant.

A further breakdown of the 24-hr LC50 generated data shows that, of the total of 223 24-hr LC50 mysid tests, 199 (88%) and 50% or greater mortality at 24 hours, even with the average effluent concentration for these tests being only 22%. This indicates that if these tests had been run using 100% effluent, the per cent mortality would have been even greater than the data currently shows.

Of the total of 226 sheepshead minnow 24-hr LC50 generated tests, 67 (30%) had 50% or greater mortality at 24 hours, even though the average effluent concentration for these tests was only 34% effluent. Of the remaining 159 tests, 138 probably would have had greater than 50% mortality if they had

been run at 100% effluent. 99 of these 138 tests were run at less than 25% effluent and the remaining 39 were run at between 25% and 50% effluent.

This data demonstrates that produced water discharges in Texas will probably violate the Texas § 307.6(e)(2)(B) Water Quality Standard. The Region is therefore using probable violation of the Standards as a basis for requiring no discharge of produced water in Coastal Subcategory areas of Texas.

(4) *Mixing zones:* The mixing zones established for implementing the Texas Water Quality Standards are: aquatic life protection—100 foot radius for lakes and reservoirs, 200 foot radius for bays, estuaries and tidal rivers; human health protection—200 foot radius for lakes and reservoirs, 400 foot radius for bays, estuaries and tidal rivers.

(5) *Modeling of produced water discharges:* Dispersion modeling was done to determine whether produced water discharges will violate Texas Water Quality Standards Numeric Criteria for Toxic Materials (Section 307.6), or General Criteria for Toxic Parameters (307.4). The dispersion model used was the CORMIX 1 model. The model was run using a water depth of 3 meters. This modeling approximates the dispersion for produced water discharges into open bays in the Coastal Subcategory areas of Texas waters. It represents a reasonable case of the most dilution to be found in Texas Coastal Subcategory waters. It is, therefore, assumed that if the discharge of produced water in this scenario causes a violation of numeric or general Water Quality Standard, then such a discharge would cause a violation of that Standard in any of the Texas Coastal Subcategory waters.

The produced water discharge rates used were the average discharge rate from Louisiana State Permit Discharge Monitoring Report (DMR) data base for coastal facilities (3362 bbl/day) and the median discharge rate (813 bbl/day). The Texas Implementation Plan requires that Daily Average (Monthly Average) and Daily Maximum effluent limits be calculated from the Numeric water quality standards using a specified procedure. The effluent data are then compared with these water quality-based limits. This comparison is given in Table 8. For the comparison, the mean of all the values from the Louisiana State Permit DMR data base (using 0 for those data below detection) was used to compare with the Daily Average limits, and the 95 percentile values (of the DMR detected values) was used to compare with the Daily Max limits. It is assumed that the Louisiana produced water flow and effluent

concentration data is representative of produced water for Texas coastal operations.

A comparison of the effluent data with the water quality-based limits calculated using the median effluent flow (which results in higher limits) shows substantial violations of Daily Max limit for 8 metals and benzene. There are also substantial violations of the Daily Average limit for 6 metals.

Table 8 shows that the Narrative Water Quality Standards will also be violated. The same dispersion scenario was used as for the Numeric Standards. Produced water chronic toxicity data were taken from the Louisiana permit Discharge Monitoring Report data base. It is assumed that these data are representative of produced water from coastal Texas facilities. In order for the Narrative Standards to be met, the effluent, when diluted to 13.7% (the concentration of effluent at the edge of the mixing zone when using the mean discharge rate) must not exhibit chronic toxicity. If the produced water shows chronic toxicity at a lower percent effluent, it violates the Narrative Standards.

The chronic toxicity data, using lethality only, show that 95.6% of the 226 mysid tests and 85% of the 221 Sheepshead minnow tests violate the Standards at the edge of the mixing zone when the mean discharge rate was used. Even when using the median discharge rate, where 6.6% effluent must not be toxic, the chronic lethality data show that 85% of the mysid tests and 63% of the Sheepshead minnow tests violate the Standards at the edge of the mixing zone.

In summary, produced water effluent data show that allowing the discharge of produced water, even in the case of the most dilution in Texas coastal waters, would cause substantial violations of the Texas Water Quality Standards Numeric and Narrative Criteria. This finding forms yet another basis for the permit requirement of No Discharge for produced water.

f. Texas hazardous metals regulation. The Texas Hazardous Metals Regulation, 31 TAC 319, lists the allowable concentrations of hazardous metals for discharge into State waters. Table 9 compares the mean produced water concentrations with the Texas Hazardous Metals limits listed in 31 TAC 319.22 and 319.23. This comparison shows violations of the Regulation for Arsenic, Barium, Lead and Mercury. This finding forms yet another basis for the permit requirement of No Discharge for produced water.

g. Summary of produced water requirements based on state regulations

and water quality standards. (1) Louisiana. Section VI.C.1.b of this Fact Sheet discusses the Louisiana State Regulations which prohibit the discharge of produced water into Louisiana upland fresh waters. That Section also demonstrated that the discharge to intermediate, brackish or saline waters (except for discharges to some large bays) which requires no discharge or meet certain limits, would violate the limits imposed by those Regulations. These State Regulations, therefore, furnish a basis for the proposed permit's requirement of No Discharge of produced water to those State waters. Section VI.C.1.d demonstrated that the discharge of produced water to any Louisiana coastal waters addressed by this proposed permit will violate both the Narrative Criteria and a number of the Numeric Criteria of the Louisiana Water Quality Standards. The potential violation of these Standards furnishes a basis for the proposed permit's requirement of No Discharge of produced water.

(2) *Texas.* Section VI.C.1.c discussed that Texas Rules prohibit the discharge of produced water to inland and fresh waters of the State. This prohibition furnishes a basis for the proposed permit's No Discharge requirement to those waters. Section VI.C.1.e demonstrated that the discharge of produced water to any Texas coastal waters addressed by this proposed permit will violate both the Narrative Standards and a number of the Numeric Standards of the Texas Water Quality Standards. The potential violation of these Standards furnishes a basis for the proposed permit's requirement of No Discharge of produced water. Section VI.C.1.f showed that the discharge of produced water to Texas waters will violate the Hazardous Metals Regulation, 31 TAC 319.

2. Produced Sand

a. State regulations for produced sand. There are no Louisiana regulations comparable to the previously discussed Louisiana Regulation LAC 33:IX.7 for produced water which specifically address produced sand. Also, Texas does not have rules or regulations which specifically address produced sand.

b. Louisiana water quality standards. The Louisiana Water Quality Standards establish general and numeric criteria for discharges to state waters. General criteria apply at all times to the surface waters of the state (i.e., including waters within a mixing zone), and apply to, among other parameters, settleable solids. The General Criteria for Settleable Solids requires that "there

shall be no substances present in concentrations sufficient to produce distinctly visible solids or scum, nor shall there be any formation of long term bottom deposits of slimes or sludge banks attributable to waste discharges from municipal, industrial, or other sources including agricultural practices, mining, dredging and the exploration for and the production of oil and natural gas". The General Criteria are clearly appropriate for regulating produced sand discharges.

It is the Region's opinion that the discharge of produced sand into the shallow Coastal Subcategory waters in Louisiana would result in the cumulative formation of long term bottom deposits because of inadequate water depth for dispersion. The geographic area covered by the Louisiana Coastal permit is predominately one of very shallow water. Numerous studies have been conducted and papers written on the dispersion of drilling fluids and cuttings from rigs that show that the bulk of the discharge (even in deep water environments) remains relatively near the discharge point. Thus it is obvious that the discharge of solids such as proposed sand in very shallow water areas will have much less of a dispersion pattern and will be concentrated near the discharge point.

The region is, therefore, prohibiting the discharge of produced sand on the basis that the discharge of produced sand to Louisiana Coastal Subcategory waters would be in violation of the above-cited General Criteria.

The Region is not basing the prohibition of produced sand on the Louisiana Standards numeric criteria or the General Criteria for Toxic Substances, because of the lack of data on pollutants associated with the discharge of produced sand. Produced sand will be a potential source of pollutants addressed by the Louisiana Standards numeric criteria, as well as the general toxic criteria because of entrained and adsorbed hydrocarbons. The Region, therefore, solicits the submission of any data on produced sand relevant to Louisiana Standards numeric criteria or the General Criteria for Toxic Substances.

c. Texas water quality standards. The Texas Water Quality Standards contain both general criteria and numeric criteria. The general criteria remain in effect inside mixing zones. The Standards contain general criteria addressing both toxic parameters and solids which affect benthic biota. The latter general criteria states: "Surface water shall be essentially free of floating debris and suspended solids that are

conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers which adversely affect benthic biota or any lawful uses." As stated in Section VI.C.2.b, above, the discharge of produced sand into shallow waters will result in a concentration near the discharge point. It is the Region's opinion that the discharge of produced sand into Coastal Subcategory waters of Texas will result in the production of sediment layers which adversely affect benthic biota and, therefore, will violate the above cited Texas Standards General Criteria.

As stated in Section VI.C.2.b, above, The Region does not have sufficient data on the pollutants associated with the discharge of produced sand to use the violation of the Standards (for Texas, in this case) for numeric criteria or the general criteria for toxic parameters as a basis for prohibiting the discharge of produced sand. The Region, therefore, solicits data on pollutants associated with produced sand relevant to these criteria.

d. Summary of produced sand requirements based on state water quality standards. As stated in Sections VI.C.2.b. and c, the Region is using the probable violation of the States' Water Quality Standards General Criteria on settleable solids or production of sediment layers as a basis for the prohibition of the discharge of produced sand.

D. Summary of Produced Water Requirements

This Fact Sheet has demonstrated why these proposed permits' requirement of No Discharge of produced water and produced sand is Best Available Treatment Economically Achievable. In addition the Fact Sheet has shown that the No Discharge of produced water requirement is necessary to comply with State Rules and Regulations, and State Water Quality Narrative and Numeric Standards, and that the No Discharge of produced sand requirement is necessary to comply with State Water Quality Narrative Standards.

VII. Other Legal Requirements

A. State Certification

Under section 401(a)(1) of the Act, EPA may not issue a NPDES permit until the State in which the discharge will originate grants or waives certification to ensure compliance with appropriate requirements of the Act and State law. Section 301(b)(1)(C) of the Act requires that NPDES permits contain conditions that ensure

compliance with applicable state water quality standards or limitations. The Region has solicited certification from the Railroad Commission of Texas and the Louisiana Department of Environmental Quality.

B. Oil Spill Requirements

Section 311 of the Act prohibits the discharge of oil and hazardous materials in harmful quantities. In the 1978 amendments to section 311, Congress clarified the relationship between this section and discharges permitted under section 402 of the Act. EPA interprets the CWA to mean that routine discharges permitted under section 402 be excluded from section 311.

Discharges permitted under section 402 are not subject to section 311 if they are:

(1) In compliance with a permit under section 402 of the Act;

(2) Resulting from circumstances identified, reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Act, and subject to a condition in such permit; or,

(3) Continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Act that are caused by events occurring within the scope of the relevant operating or treatment system.

To help clarify the relationship between a spill, regulated under section 311, and a discharge regulated under section 402 permit, EPA developed the following list of spills and has included this list in all previous Gulf of Mexico oil and gas discharge permits as guidance (Note: this list is not all-inclusive):

(1) Discharges from burst or ruptured pipelines, manifolds, pressure vessels or atmospheric tanks;

(2) Discharges from uncontrolled wells;

(3) Discharges from pumps or engines;

(4) Discharges from oil gauging or measuring equipment;

(5) Discharges from pipeline scrapers, launching, and receiving equipment;

(6) Spills of diesel fuel during transfer operations;

(7) Discharges from faulty drip pans;

(8) Discharges from well heads and associated valves;

(9) Discharges from gas-liquid separators; and

(10) Discharges from flare lines.

C. Endangered Species Act

Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536, requires that federal agencies determine, in consultation with the U.S. Fish and Wildlife Service (FWS) and National

Marine Fisheries Service (NMFS), that their actions are not likely to jeopardize the continued existence of listed threatened or endangered species or result in the destruction or adverse modification of their critical habitats. Because it will eliminate the discharge of toxic produced water and produced sand to sensitive aquatic environments, issuance of these general permits as proposed is unlikely to adversely affect any listed species or their critical habitat. The Region has forwarded a copy of this notice to FWS and NMFS, requesting their written concurrence in that conclusion.

D. The Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) and its implementing regulations (15 CFR part 930, subpart D) require that any Federally licensed or permitted activity affecting the coastal zone of a State with an approved Coastal Zone Management Program (CZMA) be consistent with the CZMP (Section 307(c)(3)(A)). The State of Louisiana has a CZMP that has been approved by the National Oceanic and Atmospheric Administration (NOAA). The Region has reviewed Louisiana's Coastal Use Guidelines (including guidelines 10.1-10.14 for oil and gas and other mineral activities) and has determined that this proposed permit action is consistent with the intent of those guidelines. A copy of the draft permit, along with a consistency certification, will be submitted to Louisiana for a consistency determination.

E. The Marine Protection, Research and Sanctuaries Act

The Marine Protection, Research and Sanctuaries Act (MPRSA) of 1972 regulates the dumping of all types of materials into ocean waters and establishes a permit program for ocean dumping. In addition the MPRSA establishes the Marine Sanctuaries Program, implemented by NOAA, which requires NOAA to designate ocean waters as marine sanctuaries for the purpose of preserving or restoring their conservation, recreational, ecological or aesthetic values.

Section 302(i) of MPRSA requires that the Secretary of Commerce, after designation of a marine sanctuary, consult with other Federal agencies, and issue necessary regulations to control any activities permitted within the boundaries of the marine sanctuary. It also provides that no permit, license, or other authorization issued pursuant to any other authority shall be valid unless the Secretary shall certify that the permitted activity is consistent with the purpose of the marine sanctuaries

program and/or can be carried out within its promulgated regulations. There are presently no existing marine sanctuaries in the coastal waters of Louisiana and Texas.

F. Economic Impact (Executive Order 12291)

The Office of Management and Budget has exempted this action from the review requirements of Executive Order 12291 pursuant of section 8(b) of that order.

G. The Paperwork Reduction Act

EPA has reviewed the requirements imposed on regulated by this general permit under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, *et. seq.* The information collection requirements of this permit have been approved by the Office of Management and Budget in prior submissions. Facilities affected by this permit will not need to submit a request for coverage under the Louisiana Coastal Waters general permit for produced water and produced sand. The information collection requirements of this permit have been approved by the Office of Management and Budget in submissions made for the NPDES permit program under provisions of the Clean Water Act.

The public is invited to send comments regarding this burden estimate for any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. EPA, 401 M Street SW., Washington, DC 20460; and the Office of Water Management and Budget, Paperwork Reduction Project (2040-0086 and 2040-0004), Washington, DC 20503, marked "Attention: Desk Officer for EPA".

H. Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act (RFA) generally requires that federal agencies prepare an initial regulatory flexibility analysis (IRFA) for any proposed rule which may have a significant impact on a substantial number of small entities. EPA's current policy on RFA implementation requires preparation of an IRFA whenever a proposed rule may have any adverse economic effect on any small business, even when RFA would not require it. IRFAs need not be encyclopedic; however, their scope must be tailored to the level of resources available for the analysis, the quality and quantity of available data, and the severity of the rule's anticipated impacts on small entities. In the instant case, EPA Region 6 has few resources available for the analysis, its data base is far from

complete, and the severity of anticipated impacts is subject to considerable question.

The facilities to be regulated under the permits Region 6 proposes today are classified as Major Group 13—Oil and Gas Extraction, SIC 1311 Crude Petroleum and Natural Gas. In accordance with Small Business Administration regulations promulgated at 49 FR 5024 (February 9, 1984), businesses in that classification are "small" if they employ no more than 500 employees and have a yearly gross income of no more than 3.5 million dollars. Because it has never issued a general permit to the Coastal and Stripper Subcategory facilities which will be affected by today's proposal and thus has not been receiving reports from them, Region 6 has no information with which it might base a reasonable estimate of the number of small businesses which may be affected to some degree. Nevertheless, the number may be significant.

Even if it had an extensive historical data base, EPA could not accurately predict the consequences of the proposed permits on small businesses in the oil and gas industry because the industry as a whole appears to be in a major structural transition. There are now more favorable economic opportunities for overseas oil and gas investments, and major oil and gas operators appear to be abandoning domestic exploration and development in favor of overseas operations. This suggests major operators will drill fewer new wells in the States of Louisiana and Texas, providing additional business opportunities for smaller operators who can obtain the necessary financing. Whether or not development and production of reserves in Louisiana and Texas will continue at a pace approaching historical rates (regardless of the relatively minor effects the proposed permits may have) remains to be seen.

There are, moreover, significant differences between the operations of small and large operators in the oil and gas industry. Because large operators have greater access to capital, they have historically tended to acquire and operate the larger producing properties until they become uneconomic. The present economic climate has shortened the date by which properties have become uneconomic for large operators. Smaller operators frequently operate oil and gas properties at a profit when larger operators cannot. The reason is that larger operators have higher home office overhead costs than smaller operators. In the life of most oil fields, there thus comes a time at which leases

are transferred from large to smaller operators who are capable of operating them at a profit despite declining production. This transfer of leases from large to smaller operators is currently occurring with increasing frequency in the United States. It is thus fair to conclude that small businesses usually tend to operate older wells and fields in which oil production has declined, including most Stripper Subcategory wells.

Paradoxically, the less oil (and corresponding income) an oil well produces, the more brine it produces. Wells generating the least profit are thus generally responsible for a disproportionately large share of the environmental problems associated with discharges of produced water. From an overall perspective, the costs of ceasing existing discharges of produced water will not, as shown earlier in this notice, be significant, but it seems likely that smaller operators, *vis a vis* larger operators, will sustain relatively greater economic impacts if the permits are issued as proposed.

Most of the small businesses to be regulated under the proposed permits would incur the cost of complying with the no discharge requirement whether or not these permits were issued. The proposed permits' prohibition on discharging produced water and produced sand is largely based on existing state water quality standards and, for produced water, on state regulatory requirements, which must be complied with under State law. In some cases, particularly in Louisiana, the proposed permit requires the elimination of produced water discharges to intermediate and saline waters more quickly and universally than required by the state regulations. The permit will prohibit the discharge of produced water up to 1½ to 2 years sooner than would be required of some dischargers by the Louisiana produced water regulations, potentially affecting some small businesses adversely. As a practical matter, some small businesses will be unable to continue oil and gas production from some existing wells after the permits' prohibitions on the discharge of produced water to saline surface waters becomes effective. As pointed out earlier in this notice, the exact point at which this loss of reserves will occur depends on numerous variables, not the least of which is the fluctuating price of crude oil.

On an industry-wide basis, the economic losses small businesses may suffer from ceasing production at an earlier date will probably be mitigated by the fact that the moderately increased operating costs incurred for all existing

wells subject to the permits will result in earlier conveyances of leases from large to small operators. Although some small businesses may have to shut in older wells nearing the end of their production life, they will also have increased opportunity to obtain leases on less mature fields at an earlier stage of their production, when they are more profitable to operate. It would not be fair, however, to claim that every small operator who has to shut in an existing well will seek and obtain offsetting production.

As stated previously in this fact sheet, the no discharge limits for produced water and produced sand are largely based on state water quality standards and regulatory requirements. In addition, the prohibition on discharging produced water and sand from Coastal Subcategory wells covered by these permits is based on BAT. The CWA provides EPA with little flexibility to address the impacts that BAT limits may have on small businesses. Pursuant to CWA §§ 301 and 402 and EPA's implementing regulations, the Agency must adopt and impose uniform BAT effluent limitations on an industry-wide basis after considering (1) the age of equipment and facilities involved (2) the process employed (3) the engineering aspects of the application of various types of control techniques, and non-water quality related environmental impacts (including energy requirements). 40 CFR 125.3(d)(3). None of these factors provides a rationale for adopting less stringent or alternate BAT effluent limitations on small entities. Similarly, EPA must require compliance with state water quality standards and regulatory requirements in issuing permits, regardless of whether the discharger is a large or small entity. See generally *Arkansas v. Oklahoma*, _____ U.S. _____, 112 S. Ct. 1046 (1992). The Region has not, therefore, considered imposing different effluent limitations on small and large entities.

As described elsewhere in this notice, Region 6 considered a number of alternative technologies, hoping one might form the basis for effluent limitations that might accomplish the stated objectives of the CWA while minimizing the economic impacts of the permits on both small and large businesses. The proposed No Discharge requirements are based on reinjection of produced water and onshore disposal of produced sand. These are the least expensive of the alternative technologies which proved effective in accomplishing the objectives of BAT and allowing compliance of state water quality standards and applicable state regulations.

In proposing these permits, Region 6 has moreover considered the increased costs that record keeping and reporting requirements may impose on the entire regulated community, including small businesses. In an effort to reduce such costs, it has pared such requirements to the absolute minimum necessary to enforce these permits. For instance, Region 6 is not proposing to require that operators file notices of intent to be covered; although, receipt of such notices would provide EPA with a means of tracking those entities subject to the permit and avoid jurisdictional disputes in potential enforcement actions. Likewise, it is not proposing to establish a manifest system to ensure that produced water and sand is actually disposed of in a manner compliant with the permits. Region 6 is only proposing to require that operators report any discharge of a pollutant subject to this permit within 24 hours. Compliance with this reporting requirement should not require technical skills beyond those possessed by most small operators.

If the produced water discharge prohibitions of these permits became federally enforceable 30 days after final publication, impacts to small businesses would probably be exacerbated. The Region regards it unlikely that small businesses could successfully compete with the major oil companies in obtaining currently inadequate injection well capacity, particularly inasmuch as more acute demands for that capacity could raise the price of injection. Generally, it appears that the severity of such economic impacts is probably directly related to the length of the transition period, with longer periods producing reduced impacts. Under the administrative compliance order Region 6 intends to issue, the permits' produced water discharge prohibition will therefore become EPA-enforceable 30 days after final publication only for those produced water discharges already prohibited by state regulations and for new wells. The three year transition period reflected by the draft administrative order is the longest Region 6 now regards reasonable and consistent with Congressional policies expressed in CWA.

There is, of course, an alternative to issuing any permit, i.e., EPA could fail to propose or issue it. It does not appear that this "no action" alternative is practical in the instant matter. CWA prohibits the discharge of produced water and sand, or any other pollutant, to surface waters of the United States in the absence of an NPDES permit and the oil and gas industry has been discharging those pollutants in violation

of the Act for a considerable period. As a matter of policy, Region 6 has not taken enforcement action on those violations because the operators' failure to obtain the necessary permits has been largely due to the Agency's inability to issue them, given its limited resources and competing priorities. EPA is not, however, the only entity entitled to bring an action to enforce CWA. CWA section 505 authorizes affected citizens to bring a civil action against any unpermitted discharger, seeking injunctive relief and penalties, after providing 60 day notice to the discharger, the State in which the discharge occurs, and EPA.

Historically, there have been few citizen enforcement actions against oil and gas operators discharging to coastal waters in Louisiana and Texas. In recent months, however, a public interest environmental organization in New Orleans has provided notice to EPA Region 6 that it will file suit against identified oil and gas operators for discharging produced water without an NPDES permit. Region 6 understands that one of the announced targets of the proposed citizen suits ceased its discharges and another has agreed to a schedule for ceasing its coastal produced water discharges. Spurred by the possibility of such suits (and increasingly stringent state regulatory requirements), other oil and gas operators have begun eliminating their discharges of produced water, even where such actions are not required under current state regulations.

Unless these permits are issued, EPA expects the same organization to begin challenging more and more operators, and other public interest groups may also commence citizen suits as public concern over the adverse environmental consequences of produced water discharges increases. Neither EPA nor any other entity can reliably predict which of the many thousands of Louisiana and Texas production operations would become targets for such citizen suits, a factor which might well have a chilling effect on future investment in the domestic oil and gas industry. By accomplishing the goals of such citizen suits on an industry-wide basis in Louisiana and Texas, EPA's permits and administrative order will probably eliminate the incentive for such actions and the uncertainties they pose for individual oil and gas operators.

In summary, these permits will have some impact on a number of small entities in the oil and gas production industry. The permit requirements are, however, necessary to comply with the Clean Water Act, Louisiana and Texas

Water Quality Standards and other applicable State regulations. In only a limited number of instances will compliance with these permits require costs beyond those necessary to comply with state law the state water quality standards and other state regulations). There is no alternative to the prohibition on discharging produced water and produced sand while complying with applicable federal and state statutes. The permits do, however, keep reporting and record keeping requirements to the absolute minimum necessary for their enforcement.

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TABLE 1.—PERMIT REQUIREMENTS AND STATUTORY BASIS

Discharge and permit condition	Basis
Produced Water: No discharge	BAT. La. Regs. Tx. Regs. La. WQ Stds. Tx. WQ Stds.

TABLE 1.—PERMIT REQUIREMENTS AND STATUTORY BASIS—Continued

Discharge and permit condition	Basis
Produced Sand: No discharge	BCT. BAT. La. WQ Stds. Tx. WQ Stds.

TABLE 2.—AVERAGE PRODUCED WATER EFFLUENT CONCENTRATIONS^a—Continued

Pollutant	Concentration (ug/l)
Radium 226	160 pCi/l
Selenium	34
Silver	41
Toluene	1,580
Zinc	1,090

^aAverage concentration derived from discharge monitoring reports to Louisiana Department of Environmental Quality (LDEQ) involving a survey of 338 permits issued since 1986 and for which 120 priority pollutant scans had been submitted. For samples below detection limit, values assumed equal to zero. Records compiled by Avantl, Corp.

TABLE 2.—AVERAGE PRODUCED WATER EFFLUENT CONCENTRATIONS^a

Pollutant	Concentration (ug/l)
Antimony	1,380
Arsenic	4,071
Barium	54,410
Benzene	2,550
Cadmium	77
Chromium	77
Copper	148
Ethylbenzene	138
Lead	12,600
Mercury	130
Nickel	1,100
Phenol	3,400
Radium 226	132 pCi/l

TABLE 3.—REINJECTION COSTS FOR MODEL INJECTION WELLS

[Reinjection Well Capacity (bbt/day)]

Site	3,000	6,000	9,000
Land	\$0.38	\$0.28	\$0.21
Marsh	0.41	0.27	0.22
Bay		0.30	0.24

(In 1991 dollars. From Kerr & Associates, per Avantl, July, 1992)

TABLE 4.—COSTS FOR MODEL OIL PRODUCTION FACILITIES

	Gulf-12 ^a	Large bay ^b	Small bay/large marsh ^c	Small marsh ^d
Labor	\$1,788,700	\$192,811	\$96,306	\$48,150
Equipment & Supplies	114,000	37,620	18,810	9,405
Workover	624,300	208,019	103,010	51,505
Total (1989\$)	\$2,507,000	\$438,250	\$218,125	\$109,063
Total (1992\$)		\$486,569	\$233,284	\$118,842

^aGulf-12 (12 slot Gulf of Mexico platform) costs from Energy Information Administration, "Costs and Indices for Domestic Oil and Gas Field Equipment and Production Operations, 1987, 1988, 1989", Table G-1.

^bLarge Bay scaled from Gulf-12 by: 0.11 for labor (0.33 x 0.33 of time), 0.33 for equipment and supplies, 0.33 for workover.

^cSmall Bay/Large Marsh = 1/2 of Large Bay.

^dSmall Marsh = 1/2 of Small Bay/Large Marsh.

(From Avantl, July, 1992)

TABLE 5.—BAT COST EFFECTIVENESS SUMMARY FOR VARIOUS INDUSTRIES

Industry	Cost effectiveness (\$/pound equivalent)
Aluminum Forming	\$121
Battery Manufacturing	2
Can Making	10
Coal Mining	*0
Coil Coating	49
Electronics I	404
Foundries	84
Metal Finishing	12
Nonferrous Metals Forming	69

TABLE 5.—BAT COST EFFECTIVENESS SUMMARY FOR VARIOUS INDUSTRIES—Continued

Industry	Cost effectiveness (\$/pound equivalent)
Organic Chemicals (air and water pollutants)	5
Pesticides	15
Pulp and Paper (PCB control for De-ink Subcategory only)	18
La and Tx Coastal Oil and Gas Produced Water	12

TABLE 5.—BAT COST EFFECTIVENESS SUMMARY FOR VARIOUS INDUSTRIES—Continued

Industry	Cost effectiveness (\$/pound equivalent)
Produced Sand	71
(All costs in 1981 \$, Avantl, July, 1992)	

*BAT = BPT, therefore no additional cost.

TABLE 6.—COMPARISON OF PRODUCED WATER POLLUTANT CONCENTRATIONS WITH LOUISIANA PRODUCED WATER REGULATIONS^a

Pollutant	Effluent concentration		Louisiana regulation limit
	Mean	Median	
Benzene (mg/l)	*2.55	1.4	0.0125
Ethylbenzene (mg/l)	*0.14	0.082	4.38
Toluene (mg/l)	*1.58	1.02	0.475
Oil and Grease (mg/l)	20	17	15
Radium-226(pCi/l)	^b 132	120	60
Radium-228(pCi/l)	^b 180	159	60

TABLE 6.—COMPARISON OF PRODUCED WATER POLLUTANT CONCENTRATIONS WITH LOUISIANA PRODUCED WATER REGULATIONS—Continued

Pollutant	Effluent concentration		Louisiana regulation limit
	Mean	Median	
Toxicity (Toxicity units)*			
Myxid Acute	8.3	12.3	1
Sheepshead Acute	3.7	5.6	1
Myxid Chronic	22.1	46.3	1
Sheepshead Chronic	12.2	40	1

* All effluent data from LDEQ DMR's. Also see Table 2, Regulation from LAC: 33,IX, 7.
 † Mean of all values. If sample below detection limit, values assumed equal to zero.
 ‡ Effluent toxicity data are survival values for chronic toxicity and are LC50 values for acute toxicity.

TABLE 7-A.—COMPARISON OF MEAN PRODUCED WATER EFFLUENT CONCENTRATIONS AT EDGE OF ZID AND MIXING ZONE WITH LOUISIANA WATER QUALITY STANDARDS¹

Pollutant	Effluent conc.	Conc. at ZID ^{2,4}	Conc. at MZ ^{3,4}	Louisiana standards		
				Marine acute	Marine chronic	Human health ⁵
Arsenic	407	57(30)	54(27)	69	36	
Benzene	2550	380(191)	347(173)	2700	1370	12.5
Cadmium	77	11(5)	10(5)	45.6	10	
Copper	148	21(11)	20(10)	4.4	4.4	
Lead	12600	1750(927)	1690(835)	220	8.5	
Mercury	130	18(10)	18(8)	2.1	0.025	
Nickel	1100	153(81)	147(73)	75	8.3	
Zinc	1090	153(81)	147(73)	95	86	
Toxicity:						
Myxid Chronic (% effluent)			*4.5	13.3	(6.6)	
Sheepshead Chronic (% effluent)			*8.0	13.3	(6.6)	

¹ Comparison uses mean produced water pollutant concentration and mean chronic survival toxicities from LDEQ DMR's. All values are in ug/l, except toxicity.
² Dilutions available at edge of 50 foot zone of initial dilution (ZID) = 7.2 using mean discharge rate (and 19.6 using median discharge rate).
³ Dilutions available at edge of 200 foot mixing zone (MZ) = 7.5 using mean discharge rate (and 15.1 using median discharge rate).
⁴ Concentration values at ZID and MZ were calculated using mean discharge flow rate, and concentration values, in parentheses, at ZID and MZ were calculated using median discharge flow rate.
⁵ Applies to surface water bodies not designated as drinking water supply and protect for fish consumption.
⁶ These % effluent values must be greater (i.e., less toxic) than 13.3% using mean discharge rate (or greater than 6.6% using median discharge rate) in order to be in compliance with Louisiana Water Quality Standards, which require no chronic toxicity at the edge of the mixing zone.

TABLE 7-B.—COMPARISON OF MEDIAN PRODUCED WATER EFFLUENT CONCENTRATIONS AT EDGE OF ZID AND MIXING ZONE WITH LOUISIANA WATER QUALITY STANDARDS¹

Pollutant	Effluent conc.	Conc. at ZID ²	Conc. at MZ ³	Louisiana standards		
				Marine acute	Marine chronic	Human health ⁴
Arsenic	11	0.8	0.7	69	36	
Benzene	1400	103	99	2700	1370	12.5
Cadmium	40	2.9	2.6	45.6	10	
Copper	150	12	11	4.4	4.4	
Lead	500	37	33	220	8.5	
Mercury	1.3	0.1	0.9	2.1	0.025	
Nickel	310	23	21	75	8.3	
Phenol (T)	730	54	49	580	290	50
Zinc	150	11	10	95	86	
Toxicity:						
Myxid Chronic (% effluent)			*2.2	6.6		
Sheepshead Chronic (% effluent)			*2.2	6.6		

¹ Comparison uses median produced water pollutant concentration and median chronic survival toxicities from LDEQ DMR's. All values are in terms of ug/l, except toxicity.
² Dilutions available at edge of 50 foot zone of initial dilution (ZID) = 13.6 using median discharge rate.
³ Dilutions available at edge of 200 foot mixing zone (MZ) = 16.1 using median discharge rate.
⁴ Applies to surface water bodies not designated as drinking water supply and protect for fish consumption.
⁵ These % effluent values must be greater (i.e., less toxic) than 6.6% (using median discharge rate) in order to be in compliance with Louisiana Water Quality Standards, which require no chronic toxicity at the edge of the mixing zone.

TABLE 8.—COMPARISON OF PRODUCED WATER EFFLUENT CONCENTRATIONS WITH TEXAS WATER QUALITY-BASED EFFLUENT LIMITS¹

Pollutant	Mean ²	95 percentile ³	Limits ⁴		Limits ⁵	
			Daily average	Daily maximum	Daily average	Daily maximum
Arsenic	407	4,230	953	2,017	498	1,053
Benzene	2,550	12,000	4,806	10,167	2,133	4,512
Cadmium	77	516	136	287	86	139
Chromium	77	779	677	1,432	327	692

TABLE 8.—COMPARISON OF PRODUCED WATER EFFLUENT CONCENTRATIONS WITH TEXAS WATER QUALITY-BASED EFFLUENT LIMITS¹—Continued

Pollutant	Mean ²	95 percentile ³	Limits ⁴		Limits ⁵	
			Daily average	Daily maximum	Daily average	Daily maximum
Copper	148	470	67	142	33	69
Lead	12,600	34,000	199	421	96	203
Mercury	130	2,100	*0.58	*1.2	*0.26	*0.54
Nickel	1,100	2,100	179	378	86	183
Selenium	34	500	1,841	3,896	890	1,883
Silver	41	260	29	61	14	30
Zinc	1,090	4,630	1,061	2,244	554	1,172

¹ All values in terms of ug/l.² Mean of all LDEQ DMH values. Zero used for values below detection.³ 95 percentile of detected values.⁴ Limits calculated using median produced water discharge rate.⁵ Limits calculated using mean produced water discharge rate.⁶ Limits based on human health Water Quality Standards.

TABLE 9.—COMPARISON OF PRODUCED WATER EFFLUENT CONCENTRATIONS WITH TEXAS HAZARDOUS METALS REGULATION, 31 TAC 319

Pollutant	Mean ¹	Regulation limits, mg/l		
	mg/l	Average	Daily composite	Grab
Arsenic	0.407	0.1	0.2	0.3
Barium	54.4	1.0	2.0	4.0
Lead	12.6	0.5	1.0	1.5
Mercury	0.13	0.005	0.005	0.01

¹ Produced Water concentration values from Table 2.

Appendix A United States Environmental Protection Agency Region 6—Administrative Order

[Docket No. VI—(DNO)]

In the matter of NPDES General Permits for Produced Water and Produced Sand Discharges from the Oil and Gas Extraction Point Source Category to Coastal Waters of Louisiana and Texas; Proceedings Under Section 309(a)(3), Clean Water Act [33 U.S.C. 1319(a)(3)], in re: NPDES Permit Nos. LAG290000 and TXG290000

The following findings are made and order issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency (EPA) by section 309(a)(3) of the Clean Water Act [hereinafter "the Act"], 33 U.S.C. 1319(a)(3), and duly delegated to the Regional Administrator, Region 6, and duly redelegated to the undersigned Director, Water Management Division, Region 6. Failure to comply with the interim requirements established in this order constitutes a violation of this order and the NPDES permits.

Findings

I

Pursuant to the authority of section 402(a)(1) of the Act, 33 U.S.C. 1342, Region 6 issued National Pollutant Discharge Elimination System (NPDES) Permits Nos. LAG290000 and TXG290000 with an effective date of [EFFECTIVE DATE]. These permits prohibit the discharge of produced water and produced sand derived from Oil and Gas Point Source Category facilities to "coastal" waters of Louisiana and Texas in accordance with effluent limitations and other conditions set forth in Parts I and II of

these permits. Facilities covered by these permits include those in the Coastal Subcategory (40 CFR part 435, subpart D), the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to "coastal" waters of Louisiana and Texas, and the Offshore Subcategory (40 CFR 435, subpart A) which discharge to "coastal" waters of Louisiana and Texas.

II

Respondents herein are permittees subject to General NPDES Permit Nos. LAG290000 and/or TXG290000 and who:

A. Currently discharge produced water derived from an existing Coastal, Stripper or Offshore Subcategory well or wells to "coastal" waters of Texas, other than "inland and fresh waters", or

B. Currently discharge produced water derived from an existing Coastal, Stripper or Offshore Subcategory well or wells to "coastal" waters of Louisiana, other than "upland area waters",

C. Currently discharge produced water derived from a Coastal Subcategory well or wells located in Louisiana or Texas to waters of the United States outside Louisiana or Texas "coastal" waters.

The term "waters of the United States" is defined at 40 CFR 122.2. The term "coastal" waters is defined in NPDES Permits LAG290000 and TXG290000. The term "inland and fresh waters" is defined in NPDES Permit TXG290000. The term "upland area waters" is defined in NPDES Permit LAG290000. The term "existing" means spudded prior to the effective date of NPDES Permits LAG290000 and TXG290000.

III

To maintain oil and gas production and comply with the permits' prohibition on the discharge of produced water, a significant number of Respondents will have to reinject their produced water. A lack of access to the finite number of existing Class II disposal wells, state UIC permit writers, and drilling contractors may cause non-compliance for a significant number of Respondents. In addition, time will be required for some Respondents to reroute produced water collection lines to transport the produced water to injection wells.

IV

Respondents may reasonably perform all actions necessary to cease their discharges of produced water within three years.

Order

Based on the foregoing FINDINGS, it is Ordered that Respondents:

A. Fully comply with all conditions of NPDES Permits Nos. LAG290000 and TXG290000 except for their prohibitions on the discharge of produced water and requirements that all discharges of produced water be reported within twenty-four hours.

B. Complete all activities necessary to attain full and continuance compliance with NPDES Permits No. LAG290000 and TXG290000 as soon as possible, but in no case longer than three (3) years from the effective dates of said permits.

C. Operate and maintain all existing pollution control equipment, including existing oil/water separation equipment, in such a manner as to minimize the discharge of pollutants contained in produced water at all times until such time as respondents cease their discharges of produced water.

It is further Ordered that respondents subject to NPDES Permit LAG290000 comply at all times with Part I, Section B.1.d of said permit, requiring that Respondents meet any more stringent requirements contained in Louisiana Water Quality Regulation, LAC: 33,IX,7.708.

The effective date of this ORDER shall be [EFFECTIVE DATE].

DATED: _____

Director, Water Management Division (6W).

NPDES General Permits for Produced Water and Produced Sand Discharges From the Oil and Gas Extraction Point Source Category to Coastal Waters of Louisiana and Texas

Permit No. LAG290000, Permit No. TXG290000.

In compliance with the provisions of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq; the "Act"), these permits prohibit the discharge of produced water and produced sand derived from Oil and Gas Point Source Category facilities to "coastal" waters of Louisiana and Texas, as described below, in accordance with effluent limitations and other conditions set forth in Parts I and II.

Facilities covered by these permits include those in the Coastal Subcategory (40 CFR part 435, subpart D), the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to "coastal" waters of Louisiana and Texas, and the offshore Subcategory (40 CFR part 435, subpart A) which discharge to "coastal" waters of Louisiana and Texas.

These permits do not authorize discharges from "new sources" as defined in 40 CFR 122.2.

These permits, except for certain portions listed in Part I.B., shall become effective _____, and expire at midnight on (Five years from effective date).

Signed this _____ day of _____, 1992

Director, Water Management Division, EPA, Region 6.

Part I

Section A. General Permit Coverage and Notification Requirements

1. Permittees covered

Permittees include:

(1) Operators of facilities in the Coastal Subcategory (40 CFR part 435, subpart D) located in Louisiana and Texas. Location of a Coastal Subcategory facility is determined by the location of the wellhead associated with that facility.

(2) Operators of facilities in the Offshore Subcategory (40 CFR part 435 subpart A) and the Stripper subcategory (40 CFR part 435 subpart F) which discharge to "coastal" waters of Louisiana or Texas.

(3) Persons who dispose of produced water or produced sand for operators of Coastal Subcategory facilities located in Louisiana or Texas.

(4) Persons who dispose of pollutants to "coastal" waters of Louisiana or Texas for operators of Stripper or Offshore Subcategory facilities.

2. Notification Requirements

Permittees covered by these permits are automatically covered; a written notification of intent to be covered by these permits is not required. Since these permits cover only produced water and produced sand, discharges of other waste waters from Coastal Subcategory wells in these States must apply to be covered by NPDES Permits LAG330000 or TXG330000.

Section B. General Permit Limits

1. Permit Conditions Applicable to LAG290000

a. *Prohibitions.* Permittees shall not discharge nor shall they cause or contribute to the discharge of produced water and produced sand.

b. *Other requirements.* All dischargers must comply with any more stringent requirements contained in Louisiana Water Quality Regulations, LAC: 33,IX,7.708.

2. Permit Conditions Applicable to TXG290000

a. *Prohibitions.* Permittees shall not discharge nor shall they cause or contribute

to the discharge of produced water or produced sand.

Part II (Applicable to LAG290000 and TXG290000)

Section A. General Conditions

1. Introduction

In accordance with the provisions of 40 CFR 122.41 et. seq., this permit incorporates by reference ALL conditions and requirements applicable to NPDES permits set forth in the Clean Water Act, as amended (hereinafter known as the "Act") as well as all applicable EPA regulations.

2. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement action and/or for requiring a permittee to apply for and obtain an individual NPDES permit.

3. Permit Flexibility

This permit may be modified, revoked and reissued, or terminated for cause, in accordance with 40 CFR 122.62-64. The filing for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

4. Property Rights

This permit does not convey any property rights of any sort, or any exclusive privileges nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

5. Duty To Provide Information

The permittee shall furnish to the Regional Administrator, within a reasonable time, any information which the Regional Administrator may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish the Regional Administrator, upon request, copies of records required to be kept by this permit.

6. Criminal and Civil Liability

Except as provided in permit conditions on "Bypassing" and "Upsets", nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance. Any false or materially misleading representation or concealment of information required to be reported by the provisions of the permit, the Act or applicable CFR regulations which avoids or effectively defeats the regulatory purpose of the Permit may subject the permittee to criminal enforcement pursuant to 18 U.S.C. 1001.

7. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee may be subject under section 311 of the Clean Water Act.

8. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by section 510 of the Clean Water Act.

9. Severability

The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

Section B. Proper Operation and Maintenance

1. Need to Halt or Reduce Not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

2. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

3. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed and used by the permittee to achieve compliance with the conditions of this permit. This provision requires the operation of backup or auxiliary facilities of similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

4. Bypass of Facilities

a. *Definitions.* (1) "Bypass" means the intentional diversion of waste streams from any portion of a facility.

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities that causes them to be inoperable, or substantial and permanent loss of natural resources than can reasonably be expected to occur in the absence of bypass. Severe property damage does not mean economic loss caused by delays in production.

b. *Notice.* (1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(2) Unanticipated bypass. The permittee shall, within 24 hours, submit notice of an unanticipated bypass as required in Part II.D.2.

c. *Prohibition of bypass.* (1) Bypass is prohibited, and the Regional Administrator may take enforcement action against a permittee for bypass, unless:

(a) Bypass was unavoidable to prevent loss of life, personal injury or severe property damage;

(b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and (c) The permittee submitted notices as required by Part II.B.4.b. (2) The Regional Administrator may approve an anticipated bypass, after considering its adverse effects, if the Regional Administrator determines that it will meet three conditions listed at Part II.B.4.c.(1).

5. Upset Conditions

a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed facilities, inadequate facilities, lack of preventive maintenance, or careless or improper operation.

b. Effects of an upset. An upset constitutes an affirmative defense of an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of Part II.B.5.c. are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. The permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous logs, or other relevant evidence that:

(1) An upset occurred and that the permittee can identify the cause(s) of the upset;

(2) The permitted facility was at the time being properly operated;

(3) The permittee submitted notice of the upset as required by Part II.D.2; and

(4) The permittee complied with Part II.B.2.

d. Burden of Proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

6. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of waste waters shall be disposed of in a manner such as to prevent any pollution from such materials from entering waters of the United States.

Section C. Monitoring and Records

The permittee shall allow the Regional Administrator, or an authorized representative, upon the presentation of credentials and other documents as may be required by law to:

1. Enter upon the permittee premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, those records that are kept to assure compliance with the permit (i.e., zero discharge). These records shall be kept for a period of at least three years from the date of sampling measurement or reporting and at a specified shore-based site.

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

Section D. Reporting Requirements

1. Anticipated Noncompliance

The permittee shall give advance notice to the Regional Administrator of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

2. Twenty-Four Hour Reporting

The permittee shall report any noncompliance with this permit, bypass or upset. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or plans to reduce, eliminate, and prevent reoccurrence of the noncompliance.

3. Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in any report to the Regional Administrator, it shall promptly submit such facts or information.

4. Changes in Discharges of Toxic Substances

The permittee shall notify the Regional Administrator as soon as it knows or has reason to believe:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, or any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the "notification levels" described in 40 CFR 122.42(a)(1).

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the "notification levels" described in 40 CFR 122.42(a)(2).

5. Signatory Requirements

All reports, or information submitted to the Regional Administrator shall be signed and certified as follows:

a. For a corporation. By a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

(1) A president, secretary, treasurer, or vice-president of the corporation in charge of a principle business function, or decision making functions for the corporation, or

(2) The manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship. By a general partner or the proprietor, respectively.

c. For a municipality, State, Federal or other public agency. Either a principle executive officer or ranking elected official. For purposes of this section, a principle executive officer of a Federal agency includes:

(1) The chief executive officer of the agency, or

(2) A senior executive officer having responsibility for the overall operations of a principle geographic unit of the agency.

d. Alternatively, all reports required by the permit and other information requested by the Regional Administrator may be signed by a person described above or by a duly authorized representative only if:

(1) The authorization is made in writing by a person described above;

(2) The authorization specifies either an individual or a positive having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or oil field, superintendent, or position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either an individual or an individual occupying a named position; and

(3) The written authorization is submitted to the Regional Administrator.

e. Certification. Any person signing a document under this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for the gathering of the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

6. Availability of Reports

Except for applications, effluent data, and other data specified in 40 CFR 122.7, any information submitted pursuant to this permit may be claimed confidential by the submitter. If no claim is made at the time of submission, information may be made available to the public without further notice.

Section E. Penalties for Violations of Permit Conditions

1. Criminal

a. Negligent violations. The Act provides that any person who negligently violates permit conditions implementing sections 301, 302, 306, 307 or 308 of the Act is subject to a fine of not less than \$2500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or both.

b. Knowing violations. The Act provides that any person who knowingly violates permit conditions implementing sections 301, 302, 306, 307 or 308 of the Act is subject to a fine of not less than \$5,000 per day of violation nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or both.

c. Knowing endangerment. The Act provides that any person who knowingly violates permit conditions implementing sections 301, 302, 306, 307 and 308 of the Act and who knows at the time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than \$250,000, or by imprisonment for not more than 15 years, or both.

d. False statements. The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than \$10,000 per day, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such a person under this paragraph, punishment shall be by a fine or not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both (See section 309(c)(4) of the Clean Water Act).

2. Civil Penalties

The Act provides that any person who violates a permit condition implementing sections 301, 302, 306, 307 or 308 of the Act is subject to a civil penalty not to exceed \$25,000 per day for each violation.

3. Administrative Penalties

The Act provides that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405

of the Act is subject to a civil penalty not to exceed \$25,000 per day for each violation.

a. Class I penalty. Not to exceed \$10,000 per violation nor shall the maximum amount exceed \$25,000.

b. Class II penalty. Not to exceed \$10,000 per day for each day during which the violations continues nor shall the maximum amount exceed \$125,000.

Section F. Definitions

All definitions in section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified in this permit, additional definitions words or phrases used in this permit are as follows:

1. "Act" means the Clean Water Act (33 U.S.C. 1251 et seq.) as amended.

2. "Applicable effluent standards and limitations" means all state and Federal effluent standards and limitations to which a discharge is subject under the Act, including, but not limited to, effluent limitations, standards of performance, toxic effluent standards and prohibitions, and pretreatment standards.

3. "Applicable water quality standards" means all water quality standards to which a discharge is subject under the Act and which have been (a) approved or permitted to remain in effect by the Administrator following submission to him/her, pursuant to section 303(a) of the Act, or (b) promulgated by the Administrator pursuant to section 303(b) or 303(c) of the Act.

4. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

5. "Coastal waters" are defined as waters of the United States as defined at 40 CFR 122.2, located landward of the territorial seas.

6. "Environmental Protection Agency" means the U.S. Environmental Protection Agency.

7. "Inland and fresh waters" are defined in Texas Statewide Rule 8(e) and include those Texas waters that are not offshore or in adjacent estuarine waters.

8. "National Pollutant Discharge Elimination System" means the national program for issuing, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 318, 402 and 405 of the Act.

9. "Produced sand" means sand and other particulate matter from the producing formation and production piping (including corrosion products), as well as source sand

and hydrofrac sand. Produced sand also includes sludges generated by any chemical polymer used in a produced water treatment system.

10. "Produced water" means water and particulate matter associated with oil and gas producing formations. Produced water includes small volumes of source water and treatment chemicals that return to the surface with the produced formation fluids and pass through the produced water treating systems currently used by many oil and gas operators.

11. "Regional Administrator" means the Administrator of the U.S. Environmental Protection Agency, Region 6.

12. "Severe property damage" means substantial physical damage to property, damage to treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of bypass. Severe property damage does not mean economic loss caused by delays in production.

13. Territorial seas refers to "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles."

14. "Upland area waters" are defined in Louisiana Water quality Regulation LAC:33.IX.7.708 and includes "any land not normally inundated with water and that would not, under normal circumstances, be characterized as swamp or fresh, intermediate, brackish or saline marsh". "The land and water bottoms of all parishes north of the nine parishes contiguous with the Gulf of Mexico will be considered in toto as upland areas." Major deltaic passes of the Mississippi River and the Atchafalaya River, including Wax Lake Outlet, below Morgan City are not upland area waters for purposes of this permit.

15. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

[FR Doc. 92-30779 Filed 12-21-92; 8:45 am]

BILLING CODE 6560-50-M

**Public
Broadcasting
Rates
and
Terms
1992
Adjustment
Final
Rule**

**Tuesday
December 22, 1992**

Part IV

**Copyright Royalty
Tribunal**

37 CFR Part 304

**Public Broadcasting Royalty Rates and
Terms; 1992 Adjustment; Final Rule**

COPYRIGHT ROYALTY TRIBUNAL**37 CFR Part 304**

[Docket No. 92-2-PBRA]

1992 Adjustment of the Public Broadcasting Royalty Rates and Terms

AGENCY: Copyright Royalty Tribunal.

ACTION: Final rule; notice of final determination.

SUMMARY: This notice announces the adoption of final rules governing the terms and rates of copyright royalty payments with respect to certain uses by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic, and sculptural works. The terms and rates shall apply for the five-year period of 1993-1997.

DATES: The effective date of these rules is January 1, 1993, pursuant to 17 U.S.C. 118(b).

FOR FURTHER INFORMATION CONTACT: Linda R. Bocchi, General Counsel, Copyright Royalty Tribunal, 1825 Connecticut Avenue, NW., suite 918, Washington, DC 20009 (202-606-4400).

SUPPLEMENTARY INFORMATION: Section 118 of the Act establishes a copyright compulsory license for the use by public broadcasting entities of published nondramatic musical works and published pictorial, graphic and sculptural works. 17 U.S.C. 118. The Act specifically provides that between June 30 and December 31 of 1982, and at five-year intervals thereafter, the Tribunal "shall" conduct a proceeding for the determination of reasonable rates and terms for the use of the works. 17 U.S.C. 118(b).

Accordingly, the Tribunal commenced the 1992 public broadcasting rate adjustment proceeding on June 30, 1992. 57 FR 29066 (1992). On November 25, 1992, the Tribunal published a Notice of Proposed Rule Making in the *Federal Register*. 57 FR 55494 (1992).¹ Comments were due by December 4, 1992.

The Comments

The Tribunal received two comments in response to its Notice of Proposed Rule Making. Comments were filed by: American Society of Composers, Authors and Publishers (ASCAP); and Broadcast Music, Inc. (BMI).

ASCAP and BMI support the Tribunal's proposed rules to the degree

¹The Notice of Proposed Rule Making, 57 FR 55494 (1992), and the Notice of Final Determination together constitute the final determination of the 1992 Public Broadcasting Rate Adjustment Proceeding.

that they affect ASCAP and BMI. ASCAP and BMI also note that the rates for the performance of music by "college stations," which the Tribunal is proposing to adjust based upon a change in the Consumer Price Index (CPI), during the period between the first CPI published subsequent to December 1, 1991, and the last CPI published prior to December 1, 1992, are \$189 (ASCAP); \$189 (BMI); \$45 (SESAC); and \$1 (other). The Tribunal agrees with ASCAP and BMI. Therefore, since the above-referenced change in the CPI was 3% (1991's figure was 137.9; 1992's figure was 142, based on 1982-1984 equalling 100), the rates are adjusted, to the nearest dollar, as follows: (1) For all such compositions in the repertory of ASCAP, \$195 annually; (2) For all such compositions in the repertory of BMI, \$195; (3) For all such compositions in the repertory of SESAC, \$46 annually; (4) For the performances of any other such composition, \$1.

Accordingly, part 304 of the Tribunal's rules is revised as follows:

PART 304—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING

- Sec.
- 304.1 General.
- 304.2 Definition of public broadcasting entity.
- 304.3 [Reserved].
- 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).
- 304.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.
- 304.6 Performance of musical compositions by other public broadcasting entities.
- 304.7 Recording rights, rates and terms.
- 304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.
- 304.9 Unknown copyright owners.
- 304.10 Cost of living adjustment.
- 304.11 Notice of restrictions on use of reproductions of transmission programs.
- 304.12 Amendment of certain regulations.
- 304.13 Issuance of interpretative regulations.

Authority: 17 U.S.C. 118.801(b)(1) and 804.

§ 304.1 General.

This part 304 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 1993 and ending on December 31, 1997. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the

activities with respect to such works set forth in 17 U.S.C. 118(d).

§ 304.2 Definition of public broadcasting entity.

As used in this part, the term *public broadcasting entity* means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§ 304.3 [Reserved]**§ 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).**

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d) of copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by §§ 304.5 and 304.6, and except for compositions which are the subject of voluntary license agreements, such as the PBS/NPR/ASCAP, the PBS/NPR/BMI and the PBS/NPR/SESAC license agreements.

(a) *Determination of royalty rate.* (1) For the performance of such a work in a feature presentation of PBS:

1993-1997	\$199.18
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(2) For the performance of such a work as background or theme music in a PBS program:

1993-1997	\$50.46
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(3) For the performance of such a work in a feature presentation of a station of PBS:

1993-1997	\$17.02
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(4) For the performance of such a work as background or theme music in a program of a station of PBS:

1993-1997	\$3.59
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(5) For the performance of such a work in a feature presentation of NPR:

1993-1997	\$20.19
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(6) For the performance of such a work as background or theme music in an NPR program:

1993-1997	\$4.90
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(7) For the performance of such a work in a feature presentation of a station of NPR:

1993-1997	\$1.43
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(8) For the performance of such a work as background or theme music in a program of a station of NPR:

1993-1997	\$5.51
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(9) For the purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

(b) *Payment of royalty rate.* The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) *Records of use.* PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by paragraph 4b of the PBS/NPR/ASCAP license agreement dated October 19, 1992 to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) *Terms of use.* The fees provided in this schedule for the performance of a musical work in a program shall cover performances of such work in such program for a period of three years following the first performance.

§ 304.5 Performance of musical compositions by public broadcasting entities licensed to colleges or universities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and colleges, universities, and other nonprofit educational institutions concerning the performance of

copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, \$195 annually.

(2) For all such compositions in the repertory of BMI, \$195 annually.

(3) For all such compositions in the repertory of SESAC, \$46 annually.

(4) For the performance of any other such composition, \$1.00.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports.

§ 304.6 Performance of musical compositions by other public broadcasting entities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by radio stations not licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and noncommercial radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, in 1993, \$295; in 1994, \$310; in 1995, \$325; in 1996, \$340; in 1997, \$360.

(2) For all such compositions in the repertory of BMI, in 1993, \$295; in 1994, \$310; in 1995, \$325; in 1996, \$340; in 1997, \$360.

(3) For all such compositions in the repertory of SESAC, in 1993, \$63; in 1994, \$66; in 1995, \$69; in 1996, \$72; in 1997, \$75.

(4) For the performance of any other such compositions, in 1988 through 1992, \$1.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC each shall not in any one calendar year request more than 5 stations to furnish such reports.

§ 304.7 Recording rights, rates and terms.

(a) *Scope.* This section establishes rates and terms for the recording of nondramatic performances and displays of musical works, other than compositions subject to voluntary license agreements, on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) (i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in the PBS-distributed program:

	1993-1997
Feature	\$99.85
Concert feature (per minute)	29.98
Background	50.46
Theme:	
Single program or first series program	50.46
Other series program	20.48

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

	1993-1997
Feature	\$8.25
Concert feature (per minute)	2.17
Background	3.59
Theme:	
Single program or first series program	3.59
Other series program	1.43

(iii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

	1993-1997
Feature	\$10.81
Concert feature (per minute)	15.87
Background	5.41
Theme:	
Single program or first series program	5.41
Other series program	2.16

(3) For the purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) For such uses other than in a NPR-produced radio program:

Feature70
Feature (concert) (per half hour)	1.45
Background35

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding broadcast use periods will require the following additional payment: second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding

uses which are subsequent to December 31, 1997 shall be subject to the royalty rates established in this schedule.

(c) *Payment of royalty rates.* The required royalty rates shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) Maintenance of cue sheets. PBS and its stations, NPR, or other television public broadcasting entities shall maintain and make available for examination pursuant to subsection (e) copies of their standard cue sheets or summaries of same listing the recording of the musical works of such copyright owners.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) *Filing of use reports with the Copyright Royalty Tribunal (CRT).*

Deposit of cue sheets or summaries. PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the CRT copies of their standard music cue sheets or summaries of same (which may be in the form of hard copy of computerized reports) listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music cue sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the CRT upon its request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical composition of such owner has been recorded pursuant to this schedule.

§ 304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(a) *Scope.* This section establishes rates and terms for the use of published

pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

(A) For a featured display of a work.

1993-1997.....\$61.00

(B) For background and montage display.

1993-1997.....\$29.75

(C) For use of a work for program identification or for thematic use.

1993-1997.....\$120.25

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997.....\$39.50

(ii) For such uses in other than PBS-distributed programs:

(A) For a featured display of a work.

1993-1997.....\$39.50

(B) For background and montage display.

1993-1997.....\$20.25

(C) For use of a work for program identification or for thematic use.

1993-1997.....\$80.75

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997.....\$20.25

For the purposes of this schedule the rate for the thematic use of a work in an entire series shall be double the single program theme rate. In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) "Featured display" for purposes of this schedule means a full-screen or substantially full-screen display appearing on the screen for more than three seconds. Any display less than full-screen or substantially full-screen, or full-screen for three seconds or less, is deemed to be a "background or montage display".

(3) "Thematic use" is the utilization of the works of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) "Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced" means a transparency or other reproduction of an underlying work of fine art.

(c) *Payment of royalty rate.* PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic and sculptural works, copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) *Filing of use reports with the CRT.*

(1) PBS and its stations or other public broadcasting entity shall deposit with the CRT copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six

months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) *Terms of use.* (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work under this schedule. Succeeding broadcast use periods will require the following additional payment: Second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118 (f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§ 304.9 Unknown copyright owners.

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this Part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the CRT, upon request, information concerning fees deposited in trust funds.

§ 304.10 Cost of living adjustment.

(a) On December 1, 1993 the CRT shall publish in the Federal Register a notice of the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published prior to December 1, 1992 to the most recent Index published prior to December 1, 1993. On each December 1 thereafter the CRT shall publish a notice of the change in the cost of living during the period from the most recent index published prior to the previous notice, to the most recent Index published prior to December 1, of that year.

(b) On the same date of the notices published pursuant to paragraph (a) of this section, the CRT shall publish in the Federal Register a revised schedule of rates for § 304.5 which shall adjust those royalty amounts established in dollar amounts according to the change in the cost of living determined as provided in paragraph (a) of this section. Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule of rates for § 304.5 shall become effective thirty days after publication in the Federal Register.

§ 304.11 Notice of restrictions on use of reproductions of transmission programs.

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of not more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

§ 304.12 Amendment of certain regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time amend, modify or repeal regulations in this Part adopted pursuant to 17 U.S.C. 118(b)(3) by which "copyright owners may receive reasonable notice of the use of their works" and "under which records of such use shall be kept by public broadcasting entities."

§ 304.13 Issuance of interpretative regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time, either on its own motion or the motion of a person having a significant interest in the subject matter, issue such interpretative regulations as may be necessary or useful to the implementation of this part. Such regulations may not prior to January 1, 1998, alter the schedule of rates and terms of royalty payments by this part.

Dated: December 18, 1992.

Cindy Daub,

Chairman.

[FR Doc. 92-30914 Filed 12-21-92; 8:45 am]

BILLING CODE 1410-06-M

REGULATIONS

**Tuesday
December 22, 1992**

Part V

**Department of
Housing and Urban
Development**

Office of the Secretary

**24 CFR Part 92
HOME Investment Partnerships Program;
Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 92

[Docket No. R-92-1518; FR-2937-4-03]

RIN 2501-AB12

HOME Investment Partnerships Program

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This rule amends the existing interim rule for the HOME Investment Partnerships Program by correcting omissions, providing additional guidance, and making adjustments in response to comments and the Department's experience in administering the program. This rule also implements certain related amendments enacted by the Housing and Community Development Act of 1992.

DATES: *Effective date:* January 21, 1993
Comment due date: Comments on these amendments to the interim rule

must be submitted on or before February 22, 1993.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Rules Docket Clerk, Office of General Counsel, room 10278, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410.

Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Mary Kolesar, Director, Program Policy Division, Office of Affordable Housing, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-2470, TDD (202) 708-2565. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act Statement

The information collection requirements for the HOME Investment Partnerships Program have been approved by the Office of Management and Budget under the Paperwork

Reduction Act of 1980, and have been assigned OMB Control Number 2501-0013. This rule also contains an additional information collection requirement that has been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520).

Public reporting burden for the collection of information requirements contained in this rule are estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410-0500; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for HUD, Washington, DC 20503.

Information on the estimated public reporting burden is provided below:

Reg. Sec. and paperwork requirement	Record-keeping hours	Reporting hours	No. of Jurts.	Total hours
92.150—Program Description, including certifications	0	11	51	561

II. Background

On March 19, 1991, the Department published a proposed rule (56 FR 11592) to implement the HOME Program, which had been enacted under title II (42 U.S.C. 12701-12839) of the Cranston-Gonzalez National Affordable Housing Act (NAHA) (Pub. L. 101-625, approved November 28, 1990). The Department received 119 public comments in response to the proposed rule. After reviewing and considering these comments, HUD published an interim rule on December 16, 1991 (56 FR 65313), inviting additional comments on the program.

Since the publication of the interim rule, the Department has had some experience, albeit brief, in administering the program; has received 118 public comments on the interim rule, and has conducted 30 HOME Program training sessions across the country which also served as forums for airing issues and comments concerning the rule. In addition, the Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992) included a substantial number of

amendments to the HOME Program. A two step process for issuing a final rule emerged as the proper way to proceed, based on the information the Department has received from these sources. First, it was apparent that there were a few aspects of the rule that needed immediate correction or clarification so that the program could function as intended, and, second, there were other issues that would require additional consideration before they could be resolved, but which did not impede the basic operation of the program. As a result, the Department has determined that it is necessary, appropriate and in the public interest to make some immediate adjustments in the December 16, 1991 interim rule before waiting to address, in a final rule, all of the issues raised by the comments.

The necessary adjustments to the program are being implemented in this interim rule. Proposed rulemaking is unnecessary, since these changes, including some that implement amendments made by HCDA 1992, are made in response to public comment on the December 16, 1991 interim rule. The

use of an interim rule provides the flexibility needed to implement quickly the needed changes while still leaving the door open for a final rule that will address all of the issues raised in the comments.

The changes made by this amending interim rule will assist program participants and permit the HOME program to function as intended by correcting omissions, clarifying the intent of certain sections, making adjustments that recognize the difference between urban and rural settings, and providing additional guidance to facilitate the purpose and operation of the HOME Program.

At § 92.2, language is added to the definition of Community Housing Development Organization (CHDO) to make clear that, for State of locally chartered organizations, board members appointed by the unit of government may not appoint the remaining board members. This requirement parallels that for nonprofit organizations that are sponsored or created by a for-profit entity, but the requirement was not made explicit for government-sponsored

entities in the interim rule. This change clarifies the Department's existing policy.

The Department has received indications that the requirement in the CHDO definition that rural multi-county CHDOs have low-income resident representation from each county would impede the ability of rural nonprofit housing developers to participate in the HOME Program. This requirement would necessitate the establishment of very large governing boards in some cases. In addition, the long distances that board members from some counties would have to travel to meetings would discourage board participation and, thus, make it difficult for some rural nonprofit organizations to maintain their CHDO designation. In response to these concerns, the Department is amending the CHDO definition at § 92.2 to eliminate this requirement. This change also implements section 217 of HCDA 1992.

Section 92.2 is amended to add definitions of "moderate-income families" (identical to that used in the Comprehensive Housing Affordability Strategy rule) and "impact fee."

The Department has received comments noting that the definition of reconstruction at § 92.2, which requires that the housing be rebuilt on the same foundation, poses problems for participating jurisdictions in many areas of the country where much of the housing stock is not built upon foundations or where an existing foundation is not usable for reconstruction. The Department did not intend that its definition preclude the reconstruction of housing in these areas. In response to this concern, the reconstruction definition is amended to include the rebuilding of housing that does not have a foundation or whose foundation is not usable. The amended definition also makes clear that the new housing must be substantially similar to the original structure, must consist of the same number of units, and must be built on the same location. In addition, language is added to indicate that the replacement of a substandard manufactured housing unit with a new or standard manufactured unit is considered reconstruction.

Also at § 92.2, the definition of "project" is revised to clarify the four block area exception for scattered site projects. Many participating jurisdictions have expressed uncertainty about the applicability of this definition to areas that do not have "blocks," particularly rural areas. The general rule is that each site must be administered as a single project. The exception is that multiple sites within four blocks of each

other are permitted to constitute a single project. In areas without blocks, the four block exception cannot apply, and structures on various sites must be set up as separate HOME projects. For the purposes of Subpart M—Home Funds for Indian Tribes, the general rule also does not apply, and scattered site projects are permitted.

The procedure for designating consortia as participating jurisdictions is revised to permit the Department to provide more guidance in the application process. Previously, all of the documents necessary for participating jurisdiction designation were prepared by the applying consortium without any HUD participation and submitted along with a notice of intention to be considered a consortium under the program. The submissions usually required additional refinement before they were considered acceptable by the Department. To streamline this procedure, § 92.101 is amended to require first only the submission to HUD of a notice of intention to be considered a consortium. HUD will then contact the consortium and provide instruction on the form of the qualification documents and the manner and time of their submission.

As part of the documentation process for consortia (see § 92.101(a)(2)), beginning with consortia considered for FY 1994, local governments within non-urban counties will be required to sign an agreement that they are joining as part of a consortium. This new requirement will only apply to new consortia and renewals of existing consortia for purposes of the HOME Program.

Section 92.150(b) is amended to provide greater detail on the program description requirements for State participating jurisdictions. The regulation now reflects the requirement that States specify activities and tenure groups based on their approved housing strategies. For statutorily required elements of the program description (i.e. resale guidelines, forms of investments not specified in the regulation and affirmative marketing procedures), States are given the option to describe the requirements they plan to impose upon State recipients or describe the requirements being proposed by State recipients for HUD approval.

Section 92.151 is amended to clarify that the participating jurisdiction must have a current approved housing strategy or current annual plan (the one year update for the fiscal year) before it receives its allocation.

Variations in the language regarding the start date for the various deadlines for funds commitment or expenditure

have resulted in uncertainty among many participating jurisdictions. Consequently, the language in §§ 92.204(a) and 92.500(d) has been standardized to provide consistency throughout the rule and to clarify that the timeframes for the 24-month commitment deadline, the 5-year expenditure deadline, and the CHDO set-aside reservation deadline (extended from 18 to 24 months by section 212(a) of HCDA 1992), all begin after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement. This change will facilitate the tracking of these deadlines by participating jurisdictions.

Based on comments that pointed out the difficulty in making the necessary calculation, the provision in § 92.205(c) regarding the minimum amount of HOME funds that must be invested in tenant-based rental assistance is being deleted.

Numerous comments have indicated that initial operating reserves are essential to the viability of substantial rehabilitation projects as well as new construction. Consequently, § 92.206 is amended to make initial operating reserves for substantial rehabilitation projects a HOME-eligible soft cost.

Section 92.211(a)(2) is amended to implement a HCDA 1992 amendment that replaces the use of the Section 8 waiting list as the selection criterion for families eligible to receive HOME-funded tenant-based rental assistance. This assistance is now provided in accordance with written tenant selection policies and criteria that are consistent with the purposes of providing housing to very low- and low-income families and are reasonably related to preference rules established under section 6(c)(4)(A) of the Housing Act of 1937.

Section 92.211(a)(2) is also amended to permit participating jurisdictions to provide HOME-funded tenant assistance to eligible families residing in housing acquired with HOME funds without requiring that the families meet the written tenant selection policies and criteria. The rule previously allowed this only in the case of housing to be rehabilitated with HOME funds.

The Department has received a large number of comments regarding the substantial burden to participating jurisdictions of administering a program as large and complex as the HOME Program. However, HOME funds were prohibited by statute from being used to defray any administrative cost of a participating jurisdiction. Section 207 of HCDA 1992 has removed this prohibition and permits the limited use

of HOME funds for administrative and planning costs. In each fiscal year, a participating jurisdiction may expend for administrative and planning costs an amount of HOME funds that is up to ten percent of that fiscal year's HOME basic formula allocation plus or minus any money transferred or received in accordance with § 92.102(b) to meet or exceed participation threshold requirements. Section 92.206 is being amended to permit administrative and planning costs within this ten percent limit. The § 92.214 prohibition on the use of HOME funds for administrative costs is also being deleted.

Many participating jurisdictions, particularly States, have proposed, in their program descriptions and through other means, the imposition of application fees, monitoring fees, servicing fees and origination fees on HOME project owners. While participating jurisdictions may charge nominal application fees to project owners to discourage frivolous applications, the imposition of monitoring, servicing or origination fees is inconsistent with statutory intent. These fees would represent a payment for the participating jurisdiction's program administration costs. Attempts to recoup these costs would inevitably lead project developers to inflate project costs. Further, payment of such fees by the developer is inappropriate as it would create the appearance that the developer is "paying" for the HOME funds that he/she has received. Of equally great concern are the disadvantage that these fees would create for nonprofit housing developers and the potential impact of such fees on the financial feasibility of otherwise workable projects. Thus, § 92.214 is amended to prohibit monitoring, servicing and origination fees in HOME-assisted projects.

The Department has also received numerous questions regarding the eligibility of impact fees for HOME funding. They are not eligible, and to make this clear, they are added to the list of prohibited activities as § 92.214(a)(8). As noted above, a definition of impact fees is added to § 92.2.

Section 92.220(a) is amended to make it clear that only waiver of fees that a participating jurisdiction customarily charges for all transactions or projects may be counted as a matching contribution. Participating jurisdictions may not count the forgiveness of fees charged only for HOME-assisted projects toward their match requirements.

Also in § 92.220, Rental Rehabilitation Program (RRP) program income is

explicitly recognized as an eligible form of matching funds. It is worth noting that a participating jurisdiction's entire RRP program, not just the fiscal year grant, must be closed out for these funds to be considered nonfederal funds.

To correct a common misunderstanding, contributions from builders, contractors or investors involved with HOME-assisted projects are added to the list of ineligible match sources in § 92.220(b).

The Department received numerous comments regarding the maximum per unit subsidy limits established in § 92.250. It was contended that these limits would impede successful implementation of the program, particularly in high cost areas. The method of calculating these limits is to multiply the 24 CFR 221(d)(3) per unit dollar limits by a factor of .67, which reflects the presumed HOME share of combined HOME and match funds in a new construction project. The comments pointed out that this procedure assumes that the match will be made on a project-by-project basis. Since participating jurisdictions are required to make their match on a program-wide basis rather than by project, it was argued that the reduction of the § 221(d)(3) per unit limits is not appropriate. The comments further pointed out that in high cost areas this limit would seriously impede the ability to carry out both substantial rehabilitation and new construction of rental housing. Section 206 of HCDA 1992 addresses this issue and establishes the HOME maximum per unit subsidy limit at 100 percent of the § 221(d)(3) per unit dollar limits. The Department is amending § 92.250 to conform to this amendment.

The Department also received numerous comments regarding its decision not to permit waivers of the § 221(d)(3) limits to 240 percent of the basic limit for high cost areas that are "capped" at 210 percent of the limit. These comments indicated that, in high cost areas, there is a significant gap between the cost of constructing or substantially rehabilitating a unit and the maximum per unit subsidy limit. The comments contended it would be extremely difficult under the current rules for participating jurisdictions in these areas to provide sufficient subsidies to make these projects financially viable, given the HOME Program rent requirements. The Department has determined that, in certain high cost areas, this situation will not be sufficiently ameliorated by its decision to increase the maximum per unit subsidy limit to 100 percent of the § 221(d)(3) per unit limits.

Consequently, § 92.250 is amended to permit participating jurisdictions capped at 210 percent of the basic § 221(d)(3) limit to apply for an increase of their maximum per unit subsidy limit on a program-wide basis up to 240 percent, based on the costs of multifamily housing construction in the area. Section 206 of HCDA 1992 also addresses this issue, in a manner consistent with the Department's determination.

Concerning § 92.251, comments have pointed out that the requirement that a HOME-assisted property meet health and safety standards at the time of transfer of ownership will impede participating jurisdictions' ability to include housing in need of rehabilitation in HOME first-time homebuyer programs. The Department agrees that this provision poses an undue administrative burden, and § 92.251 is amended to allow purchase of a property, but not occupancy, before health and safety violations are corrected, provided that certain procedures are followed.

The requirement at § 92.252(a)(2) that in order to qualify as affordable housing a rental housing project must have not less than 20 percent of the units occupied by very low-income families is clarified by specifying that it applies only to projects consisting of three or more rental units and to owners of multiple one or two unit projects with a total of three or more rental units. It has been noted that without this clarifying change, every unit in all single unit projects and half the units in every two unit project in this category would be restricted to occupancy by very low-income families. Such a requirement would too severely limit the flexibility of the program and could impede its successful implementation. Therefore, the amendment recognizes a minimal exception to the very low-income family occupancy requirement. At the same time, the goal of emphasizing assistance to very low-income families is underscored by not exempting owner of multiple projects with a total of three or more rental units from the not less than twenty percent occupancy requirement.

In §§ 92.252(a)(5) and 92.254(a)(4)(ii)(B), covenants running with the land have been added to deed restrictions as acceptable mechanisms for ensuring long-term affordability of HOME rental and first-time homebuyer projects. Section 92.504(c)(13), which cross-references § 92.252 deed restrictions, is amended by adding conforming language.

Numerous comments have contended that the continuance of HOME long-

term affordability requirements upon foreclosure will act as a significant disincentive to private lending institutions to make loans to HOME projects, thereby diminishing the HOME Program's effectiveness in increasing the supply of affordable housing. Section 208 of HCDA 1992 addresses this issue, and §§ 92.252 and 92.254 are amended to provide that the required affordability periods for rental housing and first-time homebuyers' assistance will be suspended upon foreclosure by a lender or other transfer in lieu of foreclosure, if the foreclosure by a lender or other transfer in lieu of foreclosure recognizes any contractual or legal rights of public agencies, nonprofit sponsors, or others to take actions that would avoid termination of low-income affordability. However, if at any time following foreclosure by a lender or other transfer in lieu of foreclosure, but still during the term of the affordability period, the owner of record prior to the foreclosure or deed-in-lieu of foreclosure, or any newly formed entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property, the affordability period shall be revived according to its original terms.

The language at § 92.254(a)(1)(ii) is revised to clarify that it is applicable where HOME funds are used to acquire standard housing for homeownership activities. In cases where housing is acquired and rehabilitation is not needed, the appraised value at the time of acquisition may not exceed the section 203(b) limit for the area and type of housing.

The first-time homebuyer resale provisions in § 92.254(a)(4) are amended to increase the maximum monthly housing payment (principal, interest, taxes and insurance) allowable for subsequent purchasers who have an income between 76 and 80 percent of median to 30 percent of adjusted gross income. This change results in greater equity by eliminating the situation where low-income families with income greater than 75 percent of median will pay less than 30 percent of income while families with lower incomes pay a greater percentage of income for housing.

Section 92.254(a)(4) is also revised to incorporate an amendment made by section 209 of HCDA 1992, which provides for an alternative resale restriction that requires the recapture of the HOME subsidy, in addition to the present restriction which requires resale within certain conditions to a low-income family.

Sections 92.252(e) and 92.254(c) are being added to explain the requirements that manufactured housing units must meet to qualify as affordable rental or homeownership housing under the HOME Program. This change responds to numerous inquiries received by the Department regarding the eligibility of various manufactured housing projects.

To clarify the requirements applicable to community housing development organization (CHDO) set-aside funds, the Department has deleted the language at § 92.300(c) which stated that HOME funds reserved for CHDOs may be used for activities eligible under § 92.205. The HOME CHDO set-aside is required to be invested in housing that is owned, developed or sponsored by a CHDO. Not all activities recognized as eligible under § 92.205 meet the criteria for ownership, development or sponsorship of a project. For instance, when a CHDO undertakes tenant-based rental assistance or, in most instances, homeowner rehabilitation assistance, it is operating as a participating jurisdiction's subrecipient. Thus, CHDO set-aside funds may not be used for these activities.

Several comments have stated that the requirement that participating jurisdictions establish local HOME accounts separate from their general fund will result in an increased administrative workload. They noted that the fund accounting techniques used by most units of government will provide for adequate tracking of HOME funds and that the use of general fund accounts will ease administration of the program. In response to these comments, language is added to § 92.500(a) to provide that participating jurisdictions may use either a separate account or a subsidiary account within its general fund (or other appropriate fund) as the local HOME account.

Section 92.502(d) has been revised to reflect that participating jurisdictions are not required to submit to HUD payment certifications documenting each drawdown of funds from the United States Treasury account. The revised language now requires participating jurisdictions to keep payment certifications for each drawdown in their project files.

Section 92.502(g) has been added to permit a State to contribute funds to a HOME project within the boundaries of a local participating jurisdiction. This procedure was established so that a State and local participating jurisdiction may jointly fund a project. Further, this change makes it clear that this new procedure must be followed if a State and local participating jurisdiction wish jointly to fund a HOME project.

III. Findings and Certifications

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

Impact on the Economy

Although the HOME Program interim rule was found to be a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981, and a regulatory impact analysis (RIA) was prepared, this amending interim rule does not constitute a "major rule". Analysis of this rule, which only makes limited adjustments to the rule for which a RIA was prepared, indicates that it would not: (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Impact on Small Entities

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities, because jurisdictions that are statutorily eligible to receive formula allocations are relatively larger cities, counties or States.

Regulatory Agenda

This rule was listed as item number 1369 in the Department's Semiannual Agenda of Regulations published on November 3, 1992 (57 FR 51392) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

Federalism Impact

The General Counsel has determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, Federalism; that this proposed rule does not have federalism implications concerning the division of

local, State, and federal responsibilities. While the HOME Program interim rule amended by this rule was determined to be a rule with federalism implications and the Department submitted a Federalism Assessment concerning the interim rule to OMB, this rule only makes limited adjustments to the interim rule and does not significantly affect any of the factors considered in the Federalism Assessment for the interim rule.

Impact on the Family

The General Counsel, as the designated official under Executive Order 12606, The Family, has determined that this rule would not have significant impact on family formation, maintenance, and general well-being. Assistance provided under the rule can be expected to support family values, by helping families achieve security and independence; by enabling them to live in decent, safe, and sanitary housing; and by giving them the means to live independently in mainstream American society. The rule would not, however, affect the institution of the family, which is requisite to coverage by the Order. Even if the rule had the necessary family impact, it would not be subject to further review under the Order, since the provision of assistance under the rule is required by statute, and is not subject to agency discretion.

List of Subjects in 24 CFR Part 92

Grant programs—housing and community development, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, the Department amends part 92 of title 24 of the Code of Federal Regulations as follows:

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

1. In part 92, the authority citation continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701-12839.

2. In § 92.2, the newly defined terms *impact fee* and *moderate-income families* are added in alphabetical order; the definitions of *project* and *reconstruction* are revised; and in the definition for *Community housing development organization* the introductory text is republished, paragraph (5) is revised, paragraph (8) introductory text is republished and paragraph (8)(i) is revised to read as follows:

§ 92.2 Definitions.

* * * * *

Community housing development organization means a private nonprofit organization that—

* * * * *

(5) Does not include a public body (including the participating jurisdiction). An organization that is State or locally chartered may qualify as a community housing development organization; however, the State or local government may not have the right to appoint more than one-third of the membership of the organization's governing body and no more than one-third of the board members may be public officials. Board members appointed by the State or local government may not appoint the remaining two-thirds of the board members;

* * * * *

(8) Maintains accountability to low-income community residents by—

(i) Maintaining at least one-third of its governing board's membership for residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations. For urban areas, "community" may be a neighborhood or neighborhoods, city, county or metropolitan area; for rural areas, it may be a neighborhood or neighborhoods, town, village, county, or multi-county area (but not the entire State); and

* * * * *

Impact fee means a fee or charge, levied by a government against a property, to cover wholly or partly the cost of providing capital improvements or public services necessitated by the construction or alteration of a residential or commercial development, or to control growth.

* * * * *

Moderate income families means families whose incomes are between 80 percent and 95 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 95 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes.

* * * * *

Project means a site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or (when permissible) sites on which the building or buildings are located, that are under common ownership, management, and

financing and are to be assisted with HOME funds, under a commitment by the owner, as a single undertaking under this part. Project includes all the activities associated with the site and building. A project may include more than one site only if the sites are within a four block area of each other or if the project is undertaken pursuant to subpart M (HOME Funds for Indian Tribes) of this part.

* * * * *

Reconstruction means the rebuilding, on the same foundation, of housing standing on a site at the time of project commitment. If the housing has no foundation, or if it is not possible to rebuild on the existing foundation, then the foundation is considered to be the same location as the housing being reconstructed. Rooms may be added outside the foundation or footprint of the housing being reconstructed, but the reconstructed housing must be substantially similar to the original housing and the number of housing units may not be decreased or increased as part of a reconstruction project. Reconstruction also includes replacing an existing substandard unit of manufactured housing with a new or standard unit of manufactured housing. Reconstruction is rehabilitation for purposes of this part.

* * * * *

3. In § 92.101, paragraph (a) is revised to read as follows:

§ 92.101 Consortia.

(a) A consortium of geographically contiguous units of general local government is a unit of general local government for purposes of this part if—

(1) The proposed consortium or a member jurisdiction in a potential consortium, provides written notification by March 1 to the appropriate HUD Field Office of its intent to participate as a consortium in the HOME Program for the following fiscal year; (Provided that subsequent deadlines could be met, the Field Office may accept notification at a later date.);

(2) The proposed consortium provides, at such time and in a manner and form prescribed by HUD, the qualification documents, which will include submission of:

(i) A written certification by the State that the consortium will direct its activities to alleviation of housing problems within the State; and

(ii) Documentation which demonstrates that the consortium has executed a legally binding cooperation agreement among its members authorizing one member unit of general local government to act in a

representative capacity for all member units of general local government for the purposes of this part and providing that the representative member assumes overall responsibility for ensuring that the consortium's HOME Program is carried out in compliance with the requirements of this part; (For new consortia and renewal of existing consortia which include a non-urban county, the county cannot on its own include the whole county in the consortium; any unit of local government in the non-urban county that wishes to participate as a member of the consortium must sign the HOME consortium agreement.); and

(3) Before the end of the fiscal year in which the notice of intent and documentation are submitted, HUD determines that the consortium has sufficient authority and administrative capability to carry out the purposes of this part on behalf of its member jurisdictions. HUD will endeavor to make this determination as quickly as practicable after receiving the consortium's documentation in order to provide the consortium an opportunity to correct its submission, if necessary. If the submission is deficient, HUD will work with the consortium to resolve the issue, but will not delay the formula allocations.

4. In § 92.150, paragraphs (b)(3) and (c)(7) are revised to read as follows:

§ 92.150 Submission of program description and certifications.

(b) For a State, a description of how the State will distribute funds (consistent with priorities identified in its approved housing strategy) i.e., transferring funds to other participating jurisdictions that do not meet the participation threshold allocation level in § 92.102, administering a competitive process, or directly administering HOME funds. To the extent known, States should identify the areas in which HOME funds will be used. In addition, States should specify the activities to be undertaken and the tenure groups to be assisted based on their approved housing strategy regardless of the manner of distribution. For those program description items in paragraphs (b)(5), (b)(7), and (b)(8) of this section that must be approved by HUD, a State may either describe the requirements it plans to follow or, if distributing funds to State recipients, expects its recipients to follow. Alternatively, States may wish to submit to HUD the proposed requirements of its State recipients after they have

submitted their applications to the State;

(7) A certification that the participating jurisdiction and, if applicable, State recipients, will use HOME funds pursuant to the participating jurisdiction's current approved housing strategy and in compliance with all requirements of this part;

5. In § 92.151, paragraph (a) is revised, paragraph (d) is redesignated as paragraph (e) and revised, and a new paragraph (d) is added to read as follows:

§ 92.151 Review of program description and certifications.

(a) The responsible HUD Field Office will review a participating jurisdiction's program description and will approve the description unless it is not consistent with its current approved housing strategy, or if the participating jurisdiction has failed to submit information sufficient to allow HUD to make the necessary determinations required by § 92.150 (b)(5), (b)(7), and (b)(8), if applicable. If the information submitted is not consistent with its current approved housing strategy or the participating jurisdiction has not submitted information in accordance with § 92.150 (b)(5), (b)(7), and (b)(8), if applicable, the participating jurisdiction may be required to furnish any information or assurance HUD may consider necessary to approve the program description and certifications.

(d) A participating jurisdiction must have a current approved housing strategy before funds are made available.

(e) HOME Investment Partnership Agreement. After Field Office approval under this section, a HOME funds allocation is made by HUD execution of the agreement, subject to execution by the participating jurisdiction. The funds are obligated on the date HUD notifies the participating jurisdiction of HUD's execution of the agreement in accordance with this section and § 92.501.

6. In § 92.204, paragraph (a)(2)(i) (A) and (B) are revised to read as follows:

§ 92.204 Applicability of requirements to entities that receive a reallocation of HOME funds, other than participating jurisdictions.

(A) Any funds that are not committed within 24 months after the last day of the month in which HUD notifies the

entity of HUD's execution of the HOME Investment Partnership Agreement;

(B) Any funds that are not expended within five years after the last day of the month in which HUD notifies the entity of HUD's execution of the HOME Investment Partnership Agreement; and

7. In § 92.205, paragraph (c) is revised to read as follows:

§ 92.205 Eligible activities: General.

(c) *Minimum amount of assistance.* The minimum amount of HOME funds that must be invested in a project involving rental housing or homeownership is \$1,000 times the number of HOME-assisted units in the project.

8. In § 92.206, paragraph (a)(4) is redesignated as paragraph (c)(5) and revised, and paragraph (f) is added to read as follows:

§ 92.206 Eligible costs.

(5) For new construction or substantial rehabilitation, the cost of funding an initial operating deficit reserve, which is a reserve to meet any shortfall in project income during the period of project rent-up (not to exceed 18 months) and which may only be used to pay operating expenses, reserve for replacement payments, and debt service. Any HOME funds placed in an operating deficit reserve that remain unexpended when the reserve terminates must be returned to the participating jurisdiction's local HOME Investment Trust Fund Account.

(f) *Administrative and planning costs.* A participating jurisdiction may, in each fiscal year, expend for its HOME administrative and planning costs, including the salaries of persons engaged in administering and managing its HOME activities, an amount of HOME funds that is not more than ten percent of the HOME basic formula allocation plus any funds, received in accordance with § 92.102(b) to meet or exceed participation threshold requirements, made available to it in that fiscal year. A state that transfers any funds in accordance with § 92.102(b) must exclude these funds in calculating the amount it may expend for administrative and planning costs.

9. In § 92.211, paragraph (a)(2) is revised to read as follows:

§ 92.211 Tenant-based rental assistance.

(a)

(2) The participating jurisdiction selects families in accordance with written tenant selection policies and criteria that are consistent with the purposes of providing housing to very low- and low-income families and are reasonably related to preference rules established under section 6(c)(4)(A) of the Housing Act of 1937. The participating jurisdiction may select eligible families currently residing in units that are designated for rehabilitation or acquisition under the participating jurisdiction's HOME program without requiring that the family meet the written tenant selection policies and criteria. Families so selected may use the tenant-based assistance in the rehabilitated or acquired unit or in other qualified housing. A participating jurisdiction may require the family to use the tenant-based assistance within the participating jurisdiction's boundaries or may permit the family to use the assistance outside its boundaries.

* * * * *

10. Section 92.214 is revised to read as follows:

§ 92.214 Prohibited activities.

(a) HOME funds may not be used to—

- (1) Provide a project reserve account for replacements, a project reserve account for unanticipated increases in operating costs, or operating subsidies;
- (2) Provide tenant-based rental assistance for the special purposes of the existing section 8 program, including the activities specified in § 791.403(b)(1) of this title, or preventing displacement from projects assisted with rental rehabilitation grants under part 511 of this title;
- (3) Provide nonfederal matching contributions required under any other federal program;
- (4) Provide assistance authorized under part 965 (PHA-Owned or Leased Projects—Maintenance and Operation) of this title;
- (5) Carry out activities authorized under part 968 (Public Housing Modernization) of this title;
- (6) Provide assistance to eligible low-income housing under part 248 (Prepayment of Low Income Housing Mortgages) of this title; or
- (7) Provide assistance (other than tenant-based rental assistance or assistance to a first-time homebuyer to acquire housing previously assisted with HOME funds) to a project previously assisted with HOME funds during the period of affordability established by the participating jurisdiction under § 92.502 or § 92.504. However, additional HOME funds may be committed to a project up to one year

after project completion (see § 92.502), but the amount of HOME funds in the project may not exceed the maximum per-unit subsidy amount established under § 92.250.

(8) Pay impact fees.

(b) Participating jurisdictions may not charge monitoring, servicing and origination fees in HOME-assisted projects. However, participating jurisdictions may charge nominal application fees (although these fees are not an eligible HOME cost) to project owners to discourage frivolous applications.

11. In § 92.220, paragraphs (a)(1)(i) and (a)(2) are revised, the word "and" is removed at the end of paragraph (b)(3) and the period at the end of paragraph (b)(4) is removed and is replaced by "; and", and paragraph (b)(5) is added, to read as follows:

§ 92.220 Form of matching contribution.

(a) * * *

(1) * * *

(i) A cash contribution may be made by the participating jurisdiction, non-Federal public entities, private entities, or individuals. A cash contribution may be made from program income (as defined by § 85.25(b) of this title) from a Federal grant earned after the end of the award period if no Federal requirements govern the disposition of the program income. Included in this category are repayments from closed out grants under the Urban Development Action Grant Program (24 CFR part 570, subpart G) and the Housing Development Grant Program (24 CFR part 850), and from the Rental Rehabilitation Grant Program (24 CFR part 511) after all fiscal year Rental Rehabilitation grants have been closed out.

* * * * *

(2) The value, based on customary and reasonable means for establishing value, of State or local taxes, fees, or other charges that are normally and customarily imposed or charged by the participating jurisdiction on all transactions or projects in the conduct of State or local government operations but are waived, foregone, or deferred (including State low-income housing tax credits) in a manner that achieves affordability of housing assisted with HOME funds. Fees or charges that are associated with the HOME Program only (rather than normally and customarily imposed or charged on all transactions or projects) are not eligible forms of matching contributions. The amount of any real estate taxes may be based on post-improvement property value, using customary and reasonable means of establishing value. For taxes, fees, or

charges that are given for future years, the value is the present discounted cash value, based on a rate equal to the rate for the Treasury security with a maturity closest to the number of years for which the taxes, fees, or charges are waived, foregone, or deferred.

* * * * *

(b) * * *

(5) Cash or other forms of contributions from applicants for or recipients of HOME assistance or contracts, or investors who own, are working on, or are proposing to apply for, assistance for a HOME-assisted project.

12. Section 92.250 is revised to read as follows:

§ 92.250 Maximum per-unit subsidy amount.

The amount of HOME funds that a participating jurisdiction may invest on a per-unit basis in affordable housing may not exceed the per-unit dollar limits established by HUD under § 221.514(b)(1) and (c) of this title for elevator-type projects, involving nonprofit mortgagors, insured under section 221(d)(3) of the National Housing Act that apply to the area in which the housing is located. These limits are available from HUD. If the participating jurisdiction's per unit subsidy amount has already been increased to 210% as permitted in § 221.514(c) of this title, upon request to the Field Office, HUD will allow the per unit subsidy amount to be increased on a program-wide basis to an amount, up to 240% of the original per unit limits.

13. Section 92.251 is revised to read as follows:

§ 92.251 Property standards.

(a) Housing that is assisted with HOME funds, at a minimum, must meet the housing quality standards in § 882.109 of this title. In addition, housing that is newly constructed or substantially rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances. The participating jurisdiction must have written standards for rehabilitation. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials. Substantially rehabilitated housing must meet the cost-effective energy conservation and effectiveness standards in 24 CFR part 39.

(b) The following requirements apply to housing for homeownership that is to be rehabilitated after transfer of the ownership interest:

(1) Before the transfer of the homeownership interest, the participating jurisdiction must:

- (i) Inspect the housing for any defects that pose a danger to health; and
- (ii) Notify the prospective purchaser of the work needed to cure the defects and the time by which defects must be cured and applicable property standards met.

(2) The housing must be free from all noted health and safety defects before occupancy and not later than 6 months after the transfer.

(3) The housing must meet the applicable property standards (at a minimum, the housing quality standards in § 882.109 of this title) not later than 2 years after transfer of the ownership interest.

14. In § 92.252, paragraphs (a)(1)(ii), (a)(2) introductory text, (a)(5) text preceding table and (c) are revised, and paragraph (e) is added, to read as follows:

§ 92.252 Qualification as affordable housing and income targeting: Rental housing.

- (a) * * *
- (1) * * *

(ii) A rent that does not exceed 30 percent of the adjusted income of a family whose gross income equals 65 percent of the median income for the area, as determined by HUD, with adjustment for number of bedrooms in the unit, except that HUD may establish income ceilings higher or lower than 65 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. In determining the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or participating jurisdiction must subtract a monthly allowance for any utilities and services (excluding telephone) to be paid by the tenant. HUD will provide average occupancy per unit and adjusted income assumptions to be used in calculating the maximum rent allowed under this paragraph (a)(1)(ii);

(2) Has, in the case of projects with three or more rental units, or in the case of an owner of multiple one or two unit projects with a total of three or more rental units, not less than 20 percent of the rental units—

(5) Will remain affordable, pursuant to deed restrictions or covenants running with the land, for not less than the appropriate period, beginning after project completion, as specified in the following table, without regard to the

term of the mortgage or to transfer of ownership, except that upon foreclosure by a lender or other transfer in lieu of foreclosure, the affordability period shall be suspended if the foreclosure by a lender or other transfer in lieu of foreclosure recognizes any contractual or legal rights of public agencies, nonprofit sponsors, or others to take actions that would avoid termination of low-income affordability. However, if at any time following transfer by foreclosure or transfer in lieu of foreclosure, but still during the term of the affordability period, the owner of record prior to the foreclosure or transfer in lieu of foreclosure, or any newly formed entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property, the affordability period shall be revived according to its original terms. * * *

(c) *Increases in tenant income.* Rental housing qualifies as affordable housing despite a temporary noncompliance with paragraph (a)(2) or (a)(3) of this section, if the noncompliance is caused by increases in the incomes of existing tenants and if actions satisfactory to HUD are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected. Tenants who no longer qualify as low-income families must pay as rent the lesser of the amount payable by the tenant under State or local law or 30 percent of the family's adjusted monthly income, as recertified annually. The preceding sentence shall not apply with respect to funds made available under this part for units that have been allocated at low-income housing tax credit by a housing credit agency pursuant to section 42 of the Internal Revenue Code 1986 (26 U.S.C. 42).

(e) *Manufactured housing.* Purchase and/or rehabilitation of a manufactured housing unit qualifies as affordable housing only if, at the time of project completion, the unit—

- (1) Is situated on a permanent foundation;
- (2) Is connected to permanent utility hook-ups;
- (3) Is located on land that is held in a fee-simple title, land-trust, or long-term ground lease with a term at least equal to that of the appropriate affordability period;
- (4) Meets the construction standards established under 24 CFR 3280;
- (5) Meets all requirements of this section.

15. In § 92.254, paragraphs (a)(1)(ii) and (a)(4) are revised, and paragraph (c) is added, to read as follows:

§ 92.254 Qualification as affordable housing: homeownership.

- (a) * * *
- (1) * * *

(ii) Has an estimated appraised value at acquisition, if standard, or after any repair needed to meet property standards in § 92.251, that does not exceed the appropriate mortgage limit described in paragraph (a)(1)(i) of this section;

(4) Is subject, for a period of 20 years for newly constructed housing or otherwise for 15 years, to resale restrictions that are established by the participating jurisdiction and determined by HUD to be appropriate to either:

(i) Make the housing available for subsequent purchase only to a low income family that will use the property as its principal residence and—

(A) Provide the owner with a fair return on investment, including any improvements; and

(B) Ensure that the housing will remain affordable, pursuant to deed restrictions, covenants running with the land, or other similar mechanisms, to a reasonable range of low-income homebuyers except that upon foreclosure by a lender or other transfer in lieu of foreclosure, the affordability period shall be suspended if the foreclosure by a lender or other transfer in lieu of foreclosure recognizes any contractual or legal rights of public agencies, nonprofit sponsors, or others to take actions that would avoid termination of low-income affordability. However, if at any time following foreclosure by a lender or other transfer in lieu of foreclosure, but still during the term of the affordability period, the owner of record prior to the foreclosure or deed-in-lieu of foreclosure, or any newly formed entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property, the affordability period shall be revived according to its original terms (Housing remains affordable if the subsequent purchaser's monthly payments of principal, interest, taxes, and insurance do not exceed 30 percent of the gross income of a family with an income equal to 75 percent of the area's median income, as determined by HUD. If the subsequent purchaser's income is between 76 percent and 80 percent of the area's median income, as determined by HUD, the participating

jurisdiction may charge up to 30 percent of the gross income, as determined by HUD. HUD will provide the average occupancy per unit assumption to be used in determining the family size.); or

(ii) Recapture of the full HOME subsidy, or if the net proceeds are less than the full amount of the HOME subsidy, recapture of the net proceeds, to be used to assist other first-time homebuyers. Net proceeds means the sales price minus loan repayment and closing costs.

(c) *Manufactured housing.* Purchase and/or rehabilitation of a manufactured housing unit qualifies as affordable housing only if, at the time of project completion, the unit—

(1) Is situated on a permanent foundation (except when assisting existing unit owners who rent the lot on which their unit sits);

(2) Is connected to permanent utility hook-ups;

(3) Is located on land that is held in a fee-simple title, land-trust, or long-term ground lease with a term at least equal to that of the appropriate affordability period;

(4) Meets the construction standards established under 24 CFR 3280 if produced after June 15, 1976. If the unit was produced prior to June 15, 1976, it must comply with applicable State or local codes;

(5) Meets all requirements of Section 92.254(a) and (b), as applicable. In cases where the owner of a manufactured housing unit does not hold fee-simple title to the land on which the unit is located, the owner may be assisted to purchase the land under paragraph (b) of this section.

16. In § 92.300, paragraph (c) is revised to read as follows:

§ 92.300 Set-aside for community housing development organizations.

(c) Up to 10 percent of the HOME funds reserved may be used for activities specified under § 92.301.

17. In § 92.500, paragraphs (a) and (d) (1), (2), (3) and (4) are revised, and (d)(5) is removed, to read as follows:

§ 92.500 The HOME Investment Trust Fund.

(a) *General.* A HOME Investment Trust Fund consists of the accounts described in this section solely for investment in eligible activities within the participating jurisdiction's boundaries in accordance with the provisions of this part. HUD will establish a HOME Investment Trust Fund United States Treasury account for each participating jurisdiction. Each participating jurisdiction may use either a separate local HOME Investment Trust Fund account or, a subsidiary account within its general fund (or other appropriate fund) as the local HOME Investment Trust Fund account.

(d) * * *

(1) Any funds in the United States Treasury account that are required to be reserved (i.e., 15 percent of the funds) by a participating jurisdiction under § 92.300 that are not reserved for a community housing development organization pursuant to a written agreement within 24 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement (HUD will make the notification on the date HUD executes the agreement);

(2) Any funds in the United States Treasury account (except rental housing production set-aside funds under § 92.51) that are not committed within 24 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement (HUD will make the notification on the date HUD executes the agreement);

(3) Any funds in the United States Treasury account that are not expended within five years after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement (HUD will make the notification on the date HUD executes the agreement); and

(4) Any penalties assessed by HUD under § 92.551 of this part.

18. In § 92.502, paragraph (d) is revised and paragraph (g) is added to read as follows:

§ 92.502 Cash and Management Information System; disbursement of HOME funds.

(d) *Payment certification.* As post-documentation of each drawdown of funds from the United States Treasury account, a participating jurisdiction must keep in its project files a payment certification, for each drawdown, in the form required by HUD.

(g) *Projects funded jointly by State and local participating jurisdiction.* A State and local participating jurisdiction may jointly fund a project within the boundaries of the local participating jurisdiction only in accordance with the following procedure:

(1) The State must designate the local participating jurisdiction as a State recipient pursuant to § 92.201(b)(2) of this part, and allocate State funds to the local participating jurisdiction;

(2) The local participating jurisdiction must then set up the project in the Cash and Management Information System in accordance with § 92.502(b) of this part, and must draw down funds for the project in accordance with § 92.502(c) of this part.

19. In § 92.504, paragraph (c)(13) is amended by revising the first two sentences to read as follows:

§ 92.504 Participating jurisdiction responsibilities; written agreements; monitoring.

(c) * * * (13) *Enforcement of the agreement.*

The agreement must provide for a means of enforcement by the participating jurisdiction or the intended beneficiaries. This means of enforcement may include liens on real property, deed restrictions, or covenants running with the land. * * *

Dated: September 30, 1992.

Jack Kemp,
Secretary.

[FR Doc. 92-30723 Filed 12-21-92; 8:45 am]
BILLING CODE 4210-33-M

1992-12-22

**Tuesday
December 22, 1992**

Part VI

**Department of the
Interior**

Bureau of Indian Affairs

**Receipt of Petition for Federal
Acknowledgment of Existence as an
Indian Tribe; Notice**

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****Receipt of Petition for Federal
Acknowledgment of Existence as an
Indian Tribe**

AGENCY: Bureau of Indian Affairs,
Interior.

ACTION: Notice.

SUMMARY: This is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Pursuant to 25 CFR 83.8(a) (formerly 25 CFR 54.8(a)) notice is hereby given that the Esselen Tribe of Monterey County, 38655 Tassajara Road, Carmel Valley, California 93924, has filed a petition for acknowledgment by the Secretary of the Interior that the group

exists as an Indian tribe. The petition was received by the Bureau of Indian Affairs (BIA) on November 16, 1992, and was signed by members of the group's governing body.

This is a notice of receipt of petition and does not constitute notice that the petition is under active consideration. Notice of active consideration will be sent by mail to the petitioner and other interested parties at the appropriate time.

Under § 83.8(d) (formerly 54.8(d)) of the Federal regulations, interested parties may submit factual and/or legal arguments in support of or in opposition to the group's petition. Any information submitted will be made available on the same basis as other information in the BIA's files. Such submissions will be provided to the petitioner upon receipt by the BIA. The petitioner will be

provided an opportunity to respond to such submissions prior to a final determination regarding the petitioner's status.

The petition may be examined, by appointment, in the Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, room 1362-MIB, 1849 C Street, NW., Washington, DC 20240, Phone: (202) 208-3592.

FOR FURTHER INFORMATION CONTACT:

Michael Lawson, (202) 208-3592.

Dated: December 9, 1992.

Ron Eden,

Acting Assistant Secretary—Indian Affairs
[FR Doc. 92-30951 Filed 12-21-92; 8:45 am]

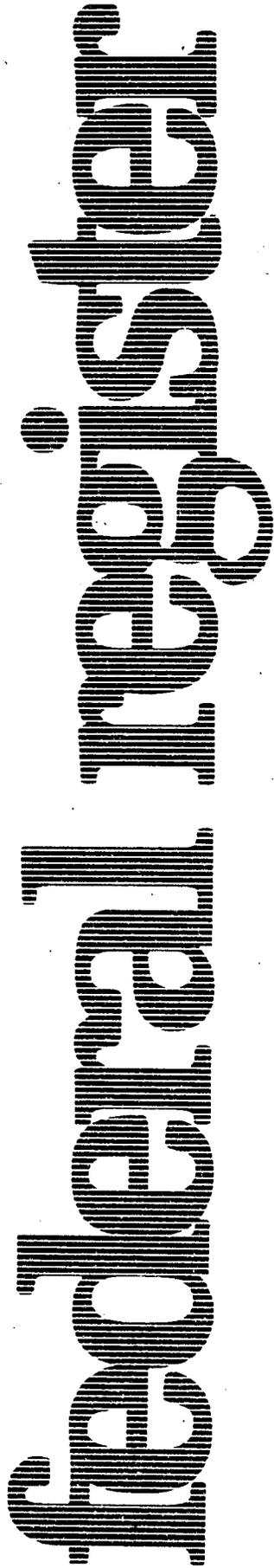
BILLING CODE 4310-02-M

**Tuesday
December 22, 1992**

Part VII

The President

**Executive Order 12825—Half-Day Closing
of Executive Departments and Agencies
of the Federal Government on Thursday,
December 24, 1992**



Title 3—

Executive Order 12825 of December 18, 1992

The President

Half-Day Closing of Executive Departments and Agencies of the Federal Government on Thursday, December 24, 1992

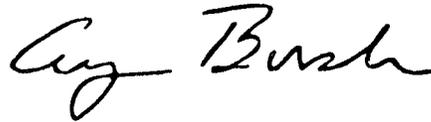
By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty for the last half of the scheduled workday on Christmas Eve, December 24, 1992, except as provided in section 2 below.

Sec. 2. The heads of executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must remain on duty for the full scheduled workday on December 24, 1992, for reasons of national security or defense or for other essential public reasons.

Sec. 3. Thursday, December 24, 1992, shall be considered as falling within the scope of Executive Order No. 11582 and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

Sec. 4. This order shall apply to executive departments and agencies of the Federal Government only and is not intended to direct or otherwise implicate departments or agencies of State or local governments.



THE WHITE HOUSE,
December 18, 1992.

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